(17,260.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 187.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN, PETITIONERS,

vs.

WILLIAM BURRILL, JAMES BURRILL, AND OTHERS, OWNERS OF THE BARK "KATE BURRILL."

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the United States for the southern district of New York	1	1
Statement	1	1
Libel	2	1
Answer	5	3
Charter-party	7	5
Exceptions to answer	10	6
Amended answer	12	7
Bill of lading	15	9
Order on exceptions	16	10
Evidence at hearing	18	10
Testimony of George W. Crossman	19	11
Respondents' Exhibit 1—Charter-party (set out at side page 7)	39	26
2—Bill of lading (set out at side page 15)	39	26
3—Order sheet	39	26
4—Invoice	41	27

	Original.	Print.
Opinion of Brown, judge, as to lesser clause	42	27
Opinion of Brown, judge, on exceptions	47	30
Opinion of Brown, judge, on motion for leave to amend, &c	49	32
Order overruling exceptions	52	34
Affidavit of George A. Black	53	34
Notice of motion for leave to amend libel	55	35
Order denying motion for leave to amend libel	56	36
Final decree	57	36
Clerk's certificate	60	38
New proofs on appeal	60½	38
Affidavit of William Burrill	61	38
Account of Phipps Brothers & Co	63	40
Account of Companhia Industrial do Brazil	64	41
Protest	65	41
Affidavit of George A. Black	66	42
Order allowing amended libel and answer to be filed	69	43
Amended libel	71	44
Amended answer	76	48
Charter-party	79	50
Bill of lading	82	52
Exceptions to answer	83	53
Opinion on exceptions—Wallace, judge	84	53
Order on exceptions	94	60
Order of substitution	95	60
Order for commission on behalf of respondents	97	61
Stipulation settling interrogatories	99	62
Commission	100	63
Interrogatories	101	63
Answers to interrogatories by E. E. Hime	104	65
Cross-interrogatories	108	68
Exhibit A, attached—Account	111	69
Answers to cross-interrogatories by E. E. Hime	112	70
Evidence for libellants	118	73
Testimony of Thomas Wilson	118	73
William Burrill	128	81
Libellants' Exhibit No. 1—Log book	130	83
2—Copy of protest	144	91
3—Copy of account	145	92
4—Copy of account	146	93
Libellants' Exhibit Letter from Burrill to Phipps Bros., and reply thereto	147	94
Opinion	149	94
Decree	153	97
Clerk's certificate	154	98
Stipulation as to return to certiorari	155	99
Return to writ of certiorari	156	99
Writ of certiorari	157	99

a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

Apostles.

Appeal from the district court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 5, 1898. James C. Reed, clerk.

1 U. S. District Court, Southern District of New York.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

Statement.

1894.
April 17. Libel filed. No process issued.
June 13. Answer filed.
" 22. Exceptions to answer filed and argued before Brown, J.
July 14. Memo. decision rendered sustaining third exception, and reversing other exceptions until further facts are stated.
" 13. Amended answer filed.
" 17. Memo. decision rendered on exceptions to answer.
Oct. 12. Order on exceptions to answer entered.
Nov. 19. Cause tried before Hon. Addison Brown, district judge.
" 28. Opinion rendered by Brown, J., construing cesser clause.

2

Dec. 17. Opinion rendered by Brown, J., on exceptions to answer.
" 31. Opinion rendered by Brown, J., denying motion for leave to amend libel.

1895.
Jan'y 9. Orders entered denying motion for leave to amend libel and overruling exceptions.
" 16. Final decree entered.
" 24. Notice of appeal filed.

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt, owners of the bark Kate Burrill, of Yarmouth, Nova Scotia, against William H. Crossman and George W. Crossman, in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

COPY BOUND CLOSE IN CENTER

I. That at the times hereinafter mentioned the libellants were the owners of the British bark Kate Burrill, and resided at Yarmouth, Nova Scotia.

II. That at the times hereinafter mentioned the respondents were copartners in business in the city of New York, under the firm name of W. H. Crossman & Brother.

III. That on or about the 7th day of March, 1893, the libellant, William Burrill, was the managing owner of the said bark Kate Burrill, and on that day entered into a written charter-party with the respondents under their firm name of W. H. Crossman & Brother, whereby the said bark was chartered to the said W. H. Crossman & Brother, for a voyage from Pensacola, Florida, to Rio de Janeiro, Brazil, for a full and complete cargo of pitch-pine
3 lumber, under and upon deck, and in and by said charter it was agreed in the words following: Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, lay days to commence from the time the vessel is ready to receive or discharge her cargo, and written notice thereof is given to the party of the second part (*i. e.*, W. H. Crossman & Brother,) or agent, and for each and every day's detention by default of the said party of the second part (*i. e.*, William H. Crossman & Brother,) or agent, fifty-nine dollars and forty-six cents, U. S. gold, or its equivalent per day, day by day, shall be paid by the said party of the second part (*i. e.*, W. H. Crossman & Brother,) or agent, to the said party of the first part, or agent. That William Burrill was the party of the first part to said charter, and W. H. Crossman & Brother were the parties of the second part to said charter.

IV. That thereafter the said vessel was loaded by respondents at Pensacola, with five hundred and thirty-four thousand one hundred and ninety-four superficial feet of pitch-pine lumber, of which sixty-seven thousand three hundred and thirty-three feet were loaded on deck, and thereafter sailed from Pensacola for Rio de Janeiro, where she arrived on or about the 30th day of August, 1893. That on the voyage by perils of the sea, which were duly excepted by said charter-party, 19,939 superficial feet of said-deck load were lost, and the said vessel at the time of her arrival at Rio de Janerio had on board 514,256 feet.

V. That on the 4th of September, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Com-
4 panhia Industrial do Brazil, the agent of the respondent-at said port of Rio, who received the said cargo, but did not discharge the same at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, but on the contrary thereof, did not complete the said discharging until November 28, 1893, being a period of fifty-three days beyond the twenty-six days, Sundays exclusive, allowed for such discharge by said charter, and that the demurrage therefor at the chartered rate of

$59.46 per day amounts to the sum of $3,151.38, payment of which has been demanded by libellants from the respondents and refused.

VI. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, libellants pray that process in due form of law may issue against the respondents, and that they may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payments to libellants of the demurrage aforesaid, with interest and costs, and that libellants may have such other judgment or relief as may be just.

WM. BURRILL.

Sworn to before me this 26th day of March, 1894.

LAWRENCE KNEELAND,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in N. Y. Co.

GEO. A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

(Endorsed:) Libel. Filed April 7, 1894.

5 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of William H. Crossman, George W. Crossman, and Hermann Sielcken, respondents, to the libel and complaint of William Burrill and others, owners of the bark Kate Burrill, in a cause of demurrage, civil and maritime.

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the making of the charter-party as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of said charter-party to the answer herein.

Third. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the fourth and fifth articles thereof, except as hereinafter admitted.

Fourth. And further answering, respondents allege that the charter-party referred to in the libel herein contained a clause providing that the vessel have an absolute lien upon the cargo for all freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden, as alleged in the fourth article of the libel herein, and that thereafter and long prior to the said fourth day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready for discharge of cargo), bills of lading for the whole of said cargo were duly signed by the master of said vessel,

and that thereupon all liability of these respondents to the
6 owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel upon the failure, alleged in the fifth article of said libel, of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until same should have been paid, in accordance with the terms of said charter-party.

Fifth. And further answering, respondents allege upon information and belief that when said vessel arrived at Rio Janeiro the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom. That they were prevented from removing the same any sooner than they did by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay and recognized the necessity therefor, and when the said cargo was delivered, accepted and received from the said consignee the sum of five hundred and fifteen pounds six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof.

7 Sixth. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, respondents pray that the libel herein be dismissed, with costs.

WHEELER & CORTIS.
Proctors for Respondents, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, says: That he is one of the respondents herein; that he has read the foregoing answer and knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

GEO. W. CROSSMAN.

Sworn to before me this 13th day of June, 1894.

JAS. MOORE,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

This charter-party, made and concluded upon in the city of New York, the 7th day of March 1893, between Wm. Burrill, managing agent for owners of the Br. bk. Kate Burrill of Yarmouth, N. S. of the burthen of 691 tons or thereabouts, register measurements, now at Barbadoes, of the first part; and Messrs. W. H. Crossman — Brother of New York of the second part; witnesseth, that the said party of the first part, agrees on the freighting and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and stowage of provisions, sails and cables), or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Pensacola Fla. to Rio de Janeiro, Brazil, on the terms following: The said vessel
8 shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or agent, and no lumber to be cut. The said party of the second part doth engage to provide and furnish to the said vessel, a full and complete cargo of Resaron pitch-pine lumber, under and upon deck; the said party of the second part agrees to pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid:—

For lumber under deck:

$13.50—thirteen and one-half dollars gold, per thousand superficial feet, inch measure, intake survey.

For lumber delivered from on deck, two-thirds of the above rate; all without primage, earned and payable on proper delivery of cargo at port of discharge, in British sterling, at the rate of $4.48 gold per pound sterling, in good and approved bills on London, at usance, or in cash at the current rate of exchange for the same, at master's option, without credit or discount.

If required by charterers lay days for loading not to commence before April 10th, 1893.

Vessel to proceed with all possible dispatch direct to port of loading, to enter upon this charter.

Vessel to haul once to loading berth as may be required by charterers, or their agents, who have the privilege of moving her afterward by paying the additional towage.

Cargo to be furnished at port of loading at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

9 Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, ($59.46) fifty-nine $\frac{46}{100}$ dollars U. S. gold, (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading, within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage around in Rio bay designated by charterers.

The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to charterers' agents at port of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter, for doing vessel's inward business.

The dangers of the seas, fires and navigation, of every nature and kind, always mutually excepted.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of the estimated amount of freight.

In witness whereof, we hereunto set our hands the day and year above written.

10 A commission of five per cent. upon the gross amount of this charter and demurrage, payable by the vessel and owners, due to Paul F. Gerhard & Co. and Edward Hincken's Son upon the signing hereof, vessel lost or not lost, charter canceled or uncanceled.

(Sign.) WM. BURRILL,
" W. H. CROSSMAN & BRO.

We hereby certify that this is a correct copy of the original charter-party now in our possession.

PAUL F. GERHARD & CO.,
By F. I. ZIMMERMANN, *Attorney,*
Brokers.

(Endorsed:) Answer. Filed June 13, 1894.

U. S. Circuit Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

I. Libellants except to the failure of the respondents to answer the second article of the libel.

II. Libellants except to the third article of the answer on the ground that the same does not answer separately and distinctly the several matters contained in each of the said fourth and fifth articles of the libel as required by the 23d admiralty rule of the

11 supreme court, and on the ground that the same is not full and explicit and distinct as to each of said articles separately,

and to each separate allegation thereof, as required by the 27th admiralty rule of the supreme court.

III. Libellants except to the fourth article of the answer in that it does not state who was the shipper of the cargo under the bills of lading mentioned in the said article of the libel, nor to whom the said cargo was deliverable, nor upon what terms.

IV. Libellants except to the fourth article of the said answer on the ground that the same is not distinct.

V. Libellants except to the sufficiency of the fourth article of the said answer.

VI. Libellants except to the sufficiency of the fifth article of the answer.

GEORGE A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

(Endorsed:) Libellants' exceptions to answer. Filed June 22, 1894. Third exception sustained; other exceptions reserved until the facts as to bill of lading on the consignment are stated. July 14, '94. A. Brown.

12 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The amended answer of William H. Crossman, George W. Crossman and Hermann Sielcken, respondents, to the libel and complaint of William Burrill and others, owners of the bark Kate Burrill, in a cause of demurrage, civil and maritime,

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the allegations contained in the second article thereof.

Third. Admits the making of a charter-party, as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of the said charter-party to the answer herein.

Fourth. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the fourth and fifth articles thereof, except as hereinafter admitted.

Fifth. And further answering, respondents allege that the charter-party referred to in the libel herein contained a clause providing that the vessel have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden, as alleged in the fourth article of the libel herein, and that thereafter, and long prior to the said fourth day of September, 1893, (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro, that
13 said vessel was ready for discharge of cargo) bills of lading for the whole of said cargo were duly signed by the master of said vessel, a copy of which is annexed hereto and made part hereof, and said bills of lading were duly assigned and delivered to

the Campania Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel Dias da Cruz & Filho, who thereby became the consignees of said cargo, and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel upon the failure alleged in the fifth article of said libel of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of said charter-party.

Sixth. And further answering, respondents allege upon information and belief, that when said vessel arrived at Rio Janeiro the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom. That they were prevented from removing the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay and recognized the necessity therefor,

14 and when the said cargo was delivered, accepted and received from the said consignee the sum of five hundred and fifteen pounds six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents and accepted and received by them in full satisfaction thereof.

Seventh. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, respondents pray that the libel herein be dismissed, with costs.

WHEELER & CORTIS,
Proctors for Respondents, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, says: That he is one of the respondents herein; that he has read the foregoing answer and knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

GEO. W. CROSSMAN.

Sworn to before me this 12th day of July, 1894.

HENRY J. WING,
Notary Public, Kings Co.

[L. S.]

Certificate filed in N. Y. Co.

A copy of the charter-party referred to in the third article hereof will be found at the end of the testimony.

15

W. H. Crossman & Bro., shipping and commission merchants, New York.

Shipped, in good order and well conditioned by W. H. Crossman & Bro. on board the bark called the Kate Burrill, whereof T. Wilson is master, now lying in the port of Pensacola, and bound for Rio de Janeiro, to say:

Marks.	Pieces.	Lumber.	S. Ft.
		Eight thousand seven hundred and eighty-nine pieces p. p. Rio deals, containing five hundred and thirty-four thousand one hundred and ninety-five superficial feet.	
		Of the above lumber one thousand and two (1,002) pieces are on deck, containing sixty-seven thousand three hundred and thirty-three (67,333) superficial feet. Measurement unknown to master.	
Total, 8,789 pieces.			Total, 534,195.

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Rio de Janeiro (the dangers of the seas, fire, and collision excepted) unto order or to their assigns, they paying freight for the said lumber as per charter-party, dated 7th March, 1893, and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

16

Dated in Pensacola, the 5th day of May, 1893.

T. WILSON.

(In red ink: Consignors' copy. Not negotiable.)

(Endorsed:) Amended answer. Filed July 13, 1894. I think the amendments within sufficient to answer the previous objections and exceptions; but I will hear the libellant further, if he desires, upon the next motion day in August. July 17, 1894. A. Brown.

At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms thereof in the post-office building in the city of New York, on the 9th day of October, 1894.

Present: Hon. Addison Brown, district judge.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

The exceptions of libellants to the answer herein having been argued by the advocates for the respective parties, and the court having sustained the first and third exceptions and overruled the second and fourth exceptions, and reserved the fifth and sixth
17 exceptions to the sufficiency of the fourth and fifth article of the said answer for further argument, after said answer had been amended. And the respondents having filed an amended answer, wherein the articles were renumbered, and the matter numbered 5th in the original answer was numbered 6th in the amended answer, and the fifth exception to said 5th article of the original answer (numbered 6th in the amended answer) having been brought on for further argument, after hearing the advocates for the respective parties, it is

Ordered, that the said fifth exception be further reserved until the hearing and determination by the court of the truth and sufficiency of the other matters alleged in defense of the action.

ADDISON BROWN.

(Endorsed:) Order. Filed Oct. 12, 1894.

18 United States District Court, Southern District of New York.

WILLIAM BURRILL and Others
against
WILLIAM M. CROSSMAM and Another.
} Before Hon. Addison Brown, Judge.

NEW YORK, *November* 19, 1894.

Appearances.

George A. Black, Esq., for libellants.
Wheeler & Cortis (Mr. Cortis), for respondents.

The claims of the libel and answer are stated.

Mr. Cortis states that this case is brought to trial on the issue as respects the bill of lading and the cessor clause set up in the amended answer, and the issue as to the agency of the consignees for the respondents as respects these goods.

Mr. Cortis offers in evidence and reads the deposition of George W. Crossman, taken November 17, 1894.

Mr. Black renews his objection (offered at page — of Mr. Crossman's depostiion) to the contents of the bill referred to by Mr. Crossman.

Taken subject to objection.

19 U. S. District Court, Southern District of New York.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Testimony of George W. Crossman, a witness on behalf of respondents, taken before George Moore, notary public, at 45 William street, New York, November 17, 1894.

Present—Mr. George A. Black, for libellants. Mr. Harold G. Cortis, for respondents.

The witness, having been duly sworn, testified as follows:

Direct examination by Mr. CORTIS:

Q. What is your business?
A. Merchant.
Q. What is your firm?
A. W. H. Crossman & Brother.
Q. Are you one of the respondents in this action?
A. I am.
Q. Where are you engaged in business as a merchant?
A. 77 and 79 South street, New York city.
Q. What is the document I now show you (witness shown document)?
A. A copy of the charter-party of the British bark Kate Burrill for a cargo of pitch pine from Pensacola, Florida, to Rio de Janeiro, Brazil.

Offered in evidence and marked Respondents' Exhibit 1.

20 Q. In pursuance of the terms of that charter-party, was that vessel loaded with lumber?
A. She was.
Q. Did your firm supply the lumber for the loading?
A. We bought it from the mills.
Q. Did your firm afterwards sell that lumber?

Objected to.

A. No; it was sold before we bought it.
Q. By whom was that sold?
A. By ourselves.
Q. To whom?
A. To the Companhia Industrial do Brazil.
Q. What is that document? (Paper shown witness.)

A. Consignors' copy of the bill of lading of the bark Kate Burrill.

Q. For the voyage in question?

A. Yes.

Paper offered in evidence. Marked Respondents' Exhibit 2.

Q. Do you know the signature?

A. I couldn't swear to the signature; I presume it to be that of the captain.

Q. I see this is marked "Consignors' copy;" what other copies were there?

A. There was a full set of three bills of lading and the consignors' copy and ship's copy.

Q. There were three negotiable bills of lading?

A. Yes, and one consignors' copy and one copy which went to the ship.

Q. Besides the three negotiable bills of lading?

A. Yes, making five altogether.

Q. Do you know what was done with the other three bills of lading, the negotiable ones?

A. They were forwarded according to the instructions contained in the letter of credit, against which we drew.

Q. To whom were they forwarded?

A. One to the bank in London, attached to our draft. Another was forwarded to the agents of the bank in Rio de Janeiro.

21 The third bill of lading was sent by a subsequent mail, with the duplicate documents, to the bank in London.

Q. To whom was the vessel consigned?

A. To the Campanhia Industrial do Brazil.

Q. You have stated that this lumber was sold before you bought it. Describe in your own language the transaction from the beginning, confining yourself to this particular cargo of lumber?

Objected to as immaterial.

A. The Companhia Industrial do Brazil cabled to us from Brazil, requesting us to quote——

Objected to unless cable is produced.

December 7, 1892, the company cabled to us asking a price at which we could buy a cargo of 550,000 to 600,000 feet of pitch pine, from Pensacola, to be shipped in May or June.

Q. Asking a price at which you could buy?

A. Supplied to them.

Q. At which they could buy?

A. Yes. "At which price can you supply us, cost, freight and commissions?"

Q. Have you a copy of that cable with you?

A. No; I have it at the office.

Q. Can you produce it?

A. Yes.

We replied December 9, 1892, offering them a cargo of 550,000

to 600,000 feet of lumber, from Pensacola, May–June, at twenty-nine dollars a thousand feet—cost, freight, commissions and insurance. On December 10th they cabled to us that the price was too high, that others were offering at less. On December 12th we cabled to them that with an actual order in hand we could probably fill at twenty-eight dollars, cost, insurance, freight and commissions. December 12th they cabled to us accepting. On December 13th they wrote to us confirming the order, as shown by the letter which I have.

Portion of letter referring to cargo offered in evidence and marked Respondents' Exhibit 3.

22 (Witness continues:) We placed the order for the lumber and chartered a vessel—we had the refusal of a vessel and a cargo—and when the offer was accepted and the business concluded we simply finished it by handing it over to the parties from whom we bought, or had the refusal.

Q. What was your next step after the Companhia do Brazil accepted your offer?

A. Confirmed it to the parties who had given us the refusal.

Q. Confirmed what?

A. The order. They gave us the refusal of the vessel and the cargo.

Q. From the same parties?

A. Yes.

Q. You then confirmed your charter of the vessel?

A. No; he chartered the vessel.

Q. Who?

A. The party from whom we bought the cargo. He provided the vessel, we signed the charter-party.

Q. After receiving the acceptance of your offer you chartered the vessel and bought the cargo?

A. Yes; not simultaneously.

Q. What was the next step?

A. There was nothing done after that until the vessel was loaded. When the vessel was loaded and the documents signed, we billed them to the Companhia do Brazil.

Objected to as to the contents of the bills.

Q. Have you a bill or a copy of the bill?

A. I have. (Produces paper.) That is a copy of the bill charging the cargo of the Kate Burrill to the Companhia Industrial do Brazil, in Rio de Janeiro.

Q. The bill of your firm?

A. Yes.

Bill offered in evidence. Marked Respondents' Exhibit 4.

Q. Was that bill paid?

A. Yes.

Q. When and how?

A. By our draft on the London and River Plate Bank, Limited, of London, against their letter of credit.

Q. Against whose letter of credit?

A. The London and River Plate bank.

23 Q. Against their letter of credit issued to whom?

A. W. H. Crossman & Brother, for account of Companhia Industrial do Brazil.

Objected to as statement of letters of credit, which should be produced.

Q. Have you a copy of the letter?

A. I think so, though they are generally returned after they are exhausted.

Q. Will you endeavor to find that?

A. I will. I think very likely it has gone back.

Q. When did you obtain that letter of credit?

A. I couldn't say.

Q. You say you don't recollect the exact date when you were paid for this cargo?

A. I didn't say that. I got the check from the bank (perhaps May 12th) in New York city, to whom we sold our draft on London; or we may have remitted that to our own bankers in London to the credit of our account.

Cross-examination by Mr. BLACK:

Q. When you say you had a letter of credit, do you mean to say that you had one for this particular transaction, or that it was a general letter of credit, on which you drew for any transaction you had?

A. A general letter.

Q. And these goods were therefore paid for, so far as the actual turning in of each to you and of this letter of credit, as a loan by the bank?

A. Not as a loan; a payment by the bank.

Q. Didn't the bank have the bills of lading and the invoice?

A. Yes.

Q. As their security for what?

A. For the cargo.

Q. As their security for what?

A. The cargo of lumber.

Q. What interest had they in the cargo of lumber?

A. They had the interest of receiving a commission from the parties for whose account they issued the letter of credit.

24 Q. It was issued to you?

A. By the bank for account of the Companhia Industrial do Brazil, whom they charged.

Q. You mean to say that the letter of credit ran to the account of the Companhia Industrial do Brazil?

A. Yes, for their account was opened.

Q. It was a particular letter of credit for their account?

A. No, a general letter of credit.

Q. I asked you whether it was a particular letter of credit for their account?

A. Certainly it was.

Q. How long had you had that letter?

A. I couldn't say; not longer than six months; they are issued for that length of time; perhaps only four months, perhaps only a month.

Q. You had been having numerous transactions with this Companhia do Brazil?

A. Yes; many.

Q. And you had been drawing on the letter of credit, handing over the bills of lading and the invoices to the bank as their security for the amount of their advances, hadn't you?

A. Yes.

Q. That was the nature of the transaction?

A. I presume that was the condition.

Q. That was the nature of the transaction between you and the bank?

A. Yes.

Q. This cargo was insured, was it not?

A. Yes.

Q. Who insured it?

A. W. H. Crossman & Brother.

Q. In what company?

A. I think in the United States Lloyds.

Q. Was there a loss collected on it?

A. That I couldn't tell.

Q. Don't you know that a portion of the deck cargo was lost?

A. I don't remember the details of that.

Q. You would have a record of it in your office?

A. Yes.

Q. Will you kindly look up that record?

A. I will.

Q. This bill of lading bears date May 5, 1893, and on the face of it has stamped in red ink "As per charter-party," dated 7th March, 1893. Do you know when that stamp was put on?

25 A. I do not know, but I suppose when the bills of lading were made out in our office.

Q. You prepared those bills of lading in your office and had them sent down to Pensacola, did you not?

A. Yes.

Q. It is a bill of lading on one of your printed forms, is it not?

A. Yes.

Q. Did you have any correspondence with the owner or master of this vessel concerning this cargo?

A. Not to my knowledge.

Q. Did you inform the master or owner of this vessel, otherwise than by preparing the bill of lading in which the cargo was deliverable to order, that you were not the parties interested in this cargo?

A. I don't think we did. It would be unusual if we did.

Q. You had an agent at Rio, had you not?
A. At that time?
Q. Yes.
A. No.
Q. Have you ever had?
A. My partner has been there on two or three occasions.
Q. Have you ever had an agent residing there?
A. We have a house with whom we work; that might be considered in the capacity of an agent.
Q. What was the name of the house?
A. Walter Christensen & Co.
Q. Did you give any instructions to the master of this vessel as to who he was to consign on arrival at Rio?
A. We always do, and I presume we did in this instance.
Q. Have you that letter?
A. Not with me.
Q. Have you a copy of it?
A. Yes.
Q. Please produce it.
Q. I notice that this charter-party contains this clause: "Vessel to be consigned to charterers' agents at port of discharge." She
26 was so consigned, was she not?
A. The concern was not our agent.
Q. You have heard that clause of the charter-party; she was consigned to the charterers' agents at the port of discharge, was she not?
A. They were not our agents.
Q. But this clause of the charter-party declared that she was to be consigned to your agent, did it not?
A. That may be.
Q. And you did consign her, did you not?
A. I consigned her, of course.
Q. Did you notify the captain or owner of this vessel that the person to whom you consigned her was not your agent?
A. It would not be likely.
Q. They would have a right, would they not, from the language used in this charter-party, to believe that the vessel was to be consigned to the charterers' agents?
A. I couldn't say what construction they would put on it.
Q. Wouldn't that be the commercial construction of those words?
A. I presume they might consider it so, yes.
Q. Do you know who actually was the representative who did the vessel's business on behalf of the charterers at Rio?
A. Phipps & Co.
Q. Of the charterers or the owner? The parties to whom she was consigned, 9 Companhia Industrial do Brazil.
Q. And you consigned her to that company, did you?
A. Yes.
Q. You informed us that you had bought this lumber for the purpose of loading this vessel, from some mill; what mill was that?

A. I couldn't tell you without referring; it was bought of the company here in New York, Wheelwright & Co.

Q. On being loaded of course you paid them for this lumber?

A. Yes.

Q. And it was your lumber, was it not, when you paid for it?

A. Yes.

Q. I understood you to say that you had disposed of the three regular bills of lading, exclusive of the ship's copy and the
27 consignor's copy, that you sent two to the bank in London, one by one mail, and one by another?

A. That would be the natural course.

Q. That is what you did testify to?

A. That would be the natural course of business.

Q. That is what you did testify to?

A. That is what I presume we did.

Q. You have so testified?

A. Yes.

Q. And the third of those was sent to the agent of the bank at Rio?

A. I presume that was done.

Q. Who was the agent of the bank at Rio?

A. The same concern, the London and River Plate bank at Brazil as well as London.

Q. They have the same title in both places?

A. I presume so.

Q. They didn't have an agent with a different name?

A. I don't know.

Q. You had a good many transactions with them?

A. I didn't; it was clerical work in the office.

Q. You have signed a great many letters addressed to those parties, haven't you?

A. Not a great many.

Q. Many?

A. Yes.

Q. Did you also correspond with the Companhia Industrial do Brazil?

A. Yes.

Q. With regard to the starting?

A. Yes.

Q. Of course you have copies of those letters?

A. Yes.

Q. Will you kindly produce any copies of letters addressed by you to the company relating to this shipment?

A. Yes.

GEORGE W. CROSSMAN, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. CORTIS:

Q. You testified in this case on Saturday?

A. Yes, sir.

Q. On Saturday you were asked to produce a letter of credit,
28 and you said you would endeavor to produce it; have you been able to get it?

A. No, sir; because it was returned to the bank after having expired by its limitation.

Q. Whereabouts was it returned to the bank; what bank?

A. To the London and River Plate Bank of London

Q. Whose letter of credit and in favor of whom?

A. The letter of credit was issued by the London and River Plate Bank of London, at the request of the Rio de Janeiro bank.

Mr. Black objects, and asks that the words "at whose request" be stricken out.

Q. In whose favor?

A. In favor of William H. Crossman & Brother.

Q. For whose account?

A. For account of Companhia Industrial do Brazil.

Objection overruled.

By the COURT:

Q. Was it ordered by you or not?

A. It was not.

By Mr. CORTIS:

Q. Do you know for whose account?

A. It is stated on the letter of credit, the Companhia Industrial do Brazil.

By the COURT:

Q. You say that that appeared on the face of the letter; was that sent to you?

A. Yes, sir.

Q. The letter of credit was sent to you?

A. Yes, sir.

Q. By whom?

A. By the London and River Plate Bank of London.

Q. Why have you not got it?

A. Because it expired and we always return them after they have been exhausted or expired.

Q. When did it expire?

A. It expired in January, 1894.

29 Q. You say you returned it to whom?

A. To the London and River Plate Bank of Rio de Janeiro. It must therefore have been issued by the London and River Plate Bank of Rio and not of London.

Q. Is that a branch of the London concern?

A. Yes, sir; it must be, because they are identically the same in name, and their credits are made one with the other. We draw on London and send some documents to London and others to Rio Janeiro, showing the connection between the two.

Q. Haven't you any copy of that original letter of credit?
A. No, sir; we never keep copies of the credits; we hold them until they are exhausted or expired and then return them to the bank.

(By Mr. CORTIS:)

Q. Have you a copy of the letter enclosing that letter of credit after it expired when you returned it?
A. Yes, sir.
Q. Have you it with you?
A. I have.

The letter is produced and offered in evidence.
Mr. Black objects.
It is ruled out on the objection.

By the COURT:

Q. Haven't you got the letter which executed the letter of credit to you?
A. No; I haven't that.
Q. Why not?
A. I didn't bring that; I didn't suppose it was necessary.
Q. Have you got it in the office?
A. Yes, sir; undoubtedly.
Q. Have you got any letters from this Companhia Industrial do Brazil going to show any of their acts in regard to this letter of credit?
A. A previous letter we have showing that.

By Mr. CORTIS:

Q. Was this original letter of credit sent to you by the Companhia Industrial do Brazil or by the bank?
A. I judge that it must have come from the company in Rio. It is customary to issue letters from both banks; in this instance, since it was returned to the Rio branch of the London and River Plate bank, it was sent by the Companhia Industrial do Brazil and not by the London banker, as I have stated.
Q. Have you that letter in your possession in your office?
A. We must have the letter in our office which enclosed to us the letter of credit.
Q. Will you produce it?
A. Yes, sir.

By the COURT:

Q. Have you got any letters here from the Companhia Industrial do Brazil in relation to this letter of credit?
A. No, sir.
Q. Have you at your office?
A. Yes, sir.
Q. Please produce them also?
A. Yes, sir.

Q. Was that bill sent to them (referring to the bill mentioned on page 6 of Mr. Crossman's deposition)?
A. It was.
Q. How?
A. Sent to them by mail in the regular way.
Q. Do you know the time?
A. I don't know the date of the departure of the mail, but on or about the date of the bill; the first day following, I presume.

By Mr. CORTIS:

Q. Have you got any reply from them in reference to the bill?
A. It is impossible to say whether they have answered; we have had some correspondence on the subject of the cargo, but whether they have answered I don't know. The bill was in conformity with the price we agreed to pay them by the cables which have passed between us.
Q. Is it customary to make any reply to a bill of that sort?

Objected to.

A. No, sir; if it is in order.

By the COURT:

Q. Have you ever received any objection to this bill?
A. None whatever.

The bill, Exhibit 4 of Crossman's deposition, is admitted for the present.

31 By Mr. CORTIS:

Q. You were asked on Saturday to produce certain cables?
A. I have the originals and copies and translations.
The first cable that I produce is the one inquiring about the price at which we could furnish cargo or cargoes. The original cable is in code. I have had it translated. (Reading:) "Rio Janeiro, Dec. 7, 1892. At what price per 1,000 feet can you ship a cargo to Rio cost insurance freight and commission of merchantable pitch pine specification C 500 to 550,000 feet clearance second or third month after next from Pensacola which means March April."
"At what price per 1,000 feet can you ship a cargo to Rio of merchantable pitch pine cost insurance freight and commission specification C 550 to 600,000 feet clearance from Pensacola deliverance May June."

By the COURT:

Q. Did you answer that?
A. I am coming to it (reading):
"Both with 20 per cent. 4 inches by 9 inches 30 feet upward.
Q. Have you got your telegram in reply?
A. To which we replied on Dec. 9: "We can ship cargo of mer-

chantable pitch pine 3 by 9 and 14 to 60 feet long cost insurance freight and commission at about 29 dollars 500 to 550,000 feet clearance from Pensacola second or third month after next."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about
32 28 dollars 500 to 550,000 feet clearance from Brunswick second or third month after next."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about 29 dollars 550 to 600,000 feet clearance from Pensacola."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about 28 dollars 550 to 600,000 feet clearance from Brunswick sail clearance May June refer to your cable of seventh."

Which means this answer refers to cable of 7th.

Q. Did you get a reply to that?

A. Yes, sir. Dec. 10. "Price quoted 4 is too high try and get a reduction others offering for less."

To which we answered on Dec. 12: "We might buy if we had an order at 28 dollars Pensacola."

They replied December 12: "Ship in accordance with our cablegram of December seventh."

Their cablegram of December 7th called for both shipments to be made from Pensacola, and we stated in our last that if we had an order in hand we could probably do that; so they said, go ahead and do that at $28; we couldn't do that.

Here is the next cablegram: "Dec. 12, sailer clearance March April Brunswick quality guaranteed. Sailer clearance May June Pensacola both 28 dollars better is impossible cable if satisfactory."

To which they replied on December 13: "Ship in accordance with your cablegrams;" that closes the transaction.

By Mr. BLACK:

Q. You had a letter after that, one of those exhibits in your deposition?

A. That is the order sheet confirming it by mail; after the transaction was concluded, as is customary, they sent us a regular order sheet in writing; it is dated December 13th, received by us on January 16th.

33 Mr. CORTIS: It is an exhibit in the deposition, marked Respondents' Exhibit 3.

The WITNESS: It is simply a confirmation of the order.

By the COURT:

Q. Have you got any letter from them saying anything about the mode of paying you?

A. None whatever, that was all settled by a previous arrangement with those gentlemen.

Q. Have you got that?

A. No, that was made years ago; we simply held the letter of credit in hand, and we were to draw against them.

Mr. Black objects and moves to strike out the last answer.

The COURT: He may state his mode of dealing with them.

Mr. Black objects that it is in writing and should be shown by the contract.

By the COURT:

Q. How long have you been dealing with them?

A. Ever since the company has been in existence; I think about four years; with their predecessors about 10 or 12 years. We deal in all kinds of merchandise, such as agricultural implements and lumber and miscellaneous goods.

Q. Were these dealings sales of goods to them?

Objected to.

A. Positive sales we never had any other relations with them than that of selling goods outright and drawing on their bankers with letters of credit for whatever shipments we might make to them by either steamers or sailing vessels.

Q. How many transactions had you with them a year on the average, speaking roughly?

34 A. We would have a transaction perhaps twice a month by steamer—that would be twenty-four, I should think, and three or four times a year by cargoes of sailing vessels; sometimes more and sometimes less. I would also like to state that we have been acting as their exclusive agents for years and years.

Q. You have said that you have been in the habit of selling them goods for four years. I want you to tell in general what has been their mode of paying you for the goods which you sold them?

A. They have kept us supplied with bankers' letters of credit which we always had on hand for their account.

Q. You understand a good deal better than a person who is not familiar with their mode of business. Will you tell us what was your habit of doing things in order to get your pay?

Objected to.

A. As soon as the shipments were completed and the bills of lading were signed, we drew against whatever letters of credit we might have in our possession, and followed the conditions of that letter of credit, whatever they might be.

By Mr. CORTIS:

Q. What were the conditions ordinarily?

Objected to. Excluded for the present.

Cross-examined by Mr. BLACK:

Mr. BLACK: I will read from the cross-examination of Mr. Crossman (reading):

"Q. Didn't the bank have the bills of lading and the invoices? A. Yes. Q. As their security for what? A. For the cargo. Q. As their security for what? A. The cargo of lumber. Q. What interest had they in the cargo of lumber? A. They had the interest of receiving a commission from the parties for whose account they issued the letter of credit." * * * "Q. This cargo was insured, was it not? A. Yes. Q. Who insured it? A. W. H.
35 Crossman & Brother. Q. In what company? A. I think in the United States Lloyds."

Q. You collected a loss on this cargo?

A. Yes, sir; a small portion of the deck-load cargo.

Q. Who was that loss paid to?

A. Paid to ourselves.

Q. What was the amount?

A. $347.94.

(Reading:) * * * "This bill of lading bears date May 5, 1893, and on the face of it has stamped in red ink 'as per charter-party,' dated 7th March, 1893. Do you know when the stamp was put on? A. I do not know, but I suppose when the bills of lading were made out in our office. Q. You prepared those bills of lading in your office and had them sent down to Brazil, did you not? A. Yes. Q. It is a bill of lading on one of your printed forms, is it not? A. Yes. Q. Did you have any correspondence with the owner or master of this vessel concerning this cargo? A. Not to my knowledge. Q. Did you inform the master or owner of this vessel, otherwise than by preparing the bill of lading in which the cargo was deliverable to order, that you were not the parties interested in this cargo? A. I don't think we did. It would be unusual if we did." * * * "Q. Did you give any instructions to the master of this vessel as to who he was to consign on arrival at Rio? A. We always do, and I presume we did in this instance."

Q. Have you that letter?

A. Yes, sir; a copy of it.

Q. Please produce it.

A. (Witness produces letter.)

Q. Is that a copy of it?

A. Yes, sir.

Mr. Black offers the copy letter in evidence and reads it as follows:

"NEW YORK, *March* 30, 1893.

"Messrs. Compahnia Industrial do Brazil, Rio de Janeiro:

"We herewith take pleasure in introducing to you the
36 captain of the bark Kate Burrill, sailing from Pensacola, Florida, consigned to your good selves. Hoping this vessel will make a safe passage and discharge her cargo in good condition and to your entire satisfaction, we remain,

"Yours very truly,

"(Signed) W. H. CROSSMAN."

(Reading:) * * * "Q. I notice that the charter-party contains this clause, 'Vessel to be consigned to charterers' agents at port of discharge.' * * * Q. And you did consign her, did you not? A. I consigned her, of course. Q. Did you notify the captain or owner of this vessel that the person to whom you consigned her was not your agent? A It would not be likely. Q. They would have a right, would they not, from the language used in this charter-party, to believe that the vessel was to be consigned to the charterers' agents? A. I couldn't say what construction they would put on it." * * * "Q. Do you know who actually was the representative who did the vessel's business on behalf of the charterers at Rio? A. Phipps & Co. Q. Of the charterers or the owner? A. The parties to whom she was consigned—Companhia Industrial do Brazil. Q. And you consigned her to that company, did you? A. Yes. Q. You informed us you had bought this lumber for the purpose of loading this vessel from some mill. What mill was that? A. I couldn't tell you without referring; it was bought of the company here in New York, Wheelwright & Co. Q. On being loaded, of course you paid them for this lumber? A. Yes. Q. And it was your lumber, was it not, when you paid for it? A. Yes."

Q. Who was it negotiated the terms of this charter?

A. I suppose that was negotiated by our buyer and the agents of the ship.

Q. Somebody in your employ?

A. Yes, sir.

Q. Did you ever inform the captain or owner of this vessel of the fact that this was not your lumber which he was carrying under this charter-party?

A. We did not in that, nor did we in any other; we never did.

37 Redirect by Mr. CORTIS:

Q. You have testified that you collected a certain sum of money for the loss of a deck-load; did you ever account to anybody for that money?

A. Yes, sir.

Q. To whom did you account for it?

Objected to as immaterial. Objection overruled.

A. To the Companhia Industrial do Brazil; it was insured for their account.

Mr. Black moves to strike out the words "insured for their account," as not responsive to any question.

Objection overruled.

By the COURT:

Q. Was there any other correspondence between you as to the manner in which you should be paid for this sale of lumber?

A. No, sir. May I explain? As I stated in my testimony, we have always been supplied with bankers' letters of credit from these

gentlemen, and when our letter of credit was expired they would send us another or instruct the London bank to send us another, and it was understood that we would draw against whatever letter of credit or credits we might have in hand, and there was no stipulation as to how we should reimburse ourselves as to any particular order that was sent to us; it was simply following along in the natural order of business. They never did give us any instructions unless under some special condition, so I doubt very much whether there is any letter down there.

Q. Between what amounts did these letters of credit run?

A. From £10,000 to £25,000 sterling.

Q. What was your custom, if any, upon making drafts under those letters of credit on account of any goods shipped to them, in regard to giving them any notice of your drafts?

Mr. Black objects as immaterial.

Objection overruled.

38 A. We forwarded them the documents, and we also stated to them that against such and such a shipment we have drawn on such and such a letter of credit for so much sterling, which at the rate of 4.82 or 4.85, whichever it might be, would equal the amount of the invoice.

Q. Did you give them any such notice in this case?

A. Yes, sir, we must have done so.

Q. Where is it?

A. In our correspondence.

Q. Have you got a copy of it?

A. I have got a copy of the correspondence to the bank at the office, but not here.

Q. That is important. Do you know whether you received any answer to that letter which you now speak of?

A. I don't think so; there would be no answer made unless there was some irregularity, some cause to complain or something of that kind.

Q. Can you testify as to the fact whether you did or did not give them such a notice of this draft?

The same objection.

A. We must have done so; yes, sir, we surely did.

Q. Can you state whether you ever received any objection from them?

The same objection.

A. Yes, sir; had there been any objection it would have been referred to me; our finance matters are always referred to me.

Q. You must produce the letter that enclosed the letter of credit against which you drew, and which ought to show on whose account that letter of credit was, and also produce the letter which you say you wrote to them giving them notice that you had drawn on that letter of credit for this bill?

A. Yes, sir.

(Testimony closed.)

39 RESPONDENTS' EXHIBIT 1. November 17, 1894.

Is the charter-party annexed to the answer.

RESPONDENTS' EXHIBIT 2. Nov. 17, 1894.

Is the bill of lading annexed to the amended answer.

RESPONDENTS' EXHIBIT 3. Nov. 17, 1894.

RIO DE JANEIRO, 13 *de Dezembro de* 1892.

Per "Strabo"
Smrs. W. H. Crossman & Bro.
New York.

Orders — By sailer
Perdidos — Por Navro.

feet of pitch pine of
No. 1884 500,000 a 550,000 pes de Pintro de resina de
First quality
O B Primeira qualidade
3 / 258

Assortment of of 30 feet and up
Sortimento: 20% de 4" x 9" de 30 pes pasa cima;
& the balance to be being half of to feet
e v resto de 3" x 9" sendo metade de 14 a 28 pes.
& the other half of 30 feet and up.
e outra metade de 30 pes para cima.
To be despatched from Brunswick in March or April 1893.
Despacho de Brunswick em Marco ou Abril de 1893.

40

feet of pitch pine of
No. 1885 550,000 a 600,000 pes de pintro de resina de
First quality
O B Primeira qualidade
3 / 260

Assortment 20% of 4" x 9" of 30 feet and up
Sortimento: 20% de 4" x 9" de 30 pes para cima;
& the balance to be 3" x 9", being half of 14 to 28 feet
e v resto de 3" x 9" sendo metade de 14 a 28 pes
& the other half of 30 feet and up.
e outra metade de 30 pes para cima.
To be despatched from Pensacola in May or June 1893
Despacho de Pensacola em Maio on Juntro de 1893
In confirmation of our cablegram No. 135 of today.
Confirmacao de nosso telegramma No. 135, de hoje.

Pela COMPANHIA INDUSTRIAL DO BRAZIL,
EDWIN E. HINE, *Theraurens.*

41 RESPONDENTS' EXHIBIT 4. Nov. 17, 1894.

Order No. 1885. No. 190.

77 & 79 BROAD STREET,
NEW YORK, *May 5th*, 1893.

(Copy)—Invoice of lumber shipped by W. H. Crossman & Bro., per bar Kate Burrill, consigned to order, for account and risk of MeCia. Industrial do Brazil.

Rio de Janeiro.

Mark: ——.

Under deck:

7,787 pcs. yellow-pine lumber, 466,862 ft., at 28.00 C. I. F. & Com	$13,072 13	
Less freight at 13.50 per M	6,302 63	
		$6,769 50
On deck:		
10,020 pcs. yellow-pine lumber, 67,333 ft., at 23.50 C. I. F. Horn	1,582 32	
Less freight at 9.00 per M	605 99	
		976 33
		$7,745 83
Insured for under deck		$8,125 00
" " on deck		1,175 00

American gold, value this day.
E. & O. E.

42 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

In admiralty. Demurrage. Cesser clause.

George A. Black, for libellants.
Wheeler & Cortis, for respondents.

BROWN, *J.*:

The above libel was filed to recover fifty-three days' demurrage, for the detention of the bark Kate Burrill at Rio de Janeiro in the unloading of a cargo of lumber at the stipulated charter rate of $59.46 per day. The respondents in their charter of the vessel from the libellants had stipulated that the vessel should "be discharged at the rate of 20,000 feet per day, lay days to commence from the time the vessel was ready to discharge cargo, and written

notice thereof given to the libellants or their agents; and that for each day of detention by default of said parties of the second part or their agent $59.46 should be paid; vessel to discharge at safe anchorage ground in Rio bay, designated by charterers or their agents." The charter contained the further stipulations, "Vessel to have an absolute lien on the cargo for all freight, dead freight and demurrage; charterers' responsibility to cease when the vessel is loaded and bills of lading are signed; bills of lading to be signed as presented without prejudice to this charter; the vessel to be consigned to charterers' agents at port of discharge."

43 The answer alleged that the lumber was shipped to the libellants' vendees in Rio under a bill of lading to order, which was endorsed to the vendees of the timber, and by the latter again endorsed to subvendees before the arrival of the bark; that the delay was caused wholly by the acts of public enemies at Rio, to wit, certain vessels of war which were then in the harbor and making war upon the government of Brazil; and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed; and further, that the captain of the vessel and the agent of the libellants acquiesced in the delay and recognized the necessity therefor; and when said cargo was delivered, accepted and received by the vendees, the sum of £515 6s. 5d. was accepted in full satisfaction and payment of all claims under the charter-party. The respondents further claim that they were relieved from all liability by the cesser clause of the charter above quoted.

For the convenience of the parties, and to save the expense and delay of a commission to Brazil to take proof of the facts pertaining to the other defenses, the cause was brought to trial as to the effect of the cesser clause above quoted.

The provisions of the charter-party are in form contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 — per day.

The general intent of these provisions taken together manifestly is that the ship shall be paid, not only freight, but demurrage, for detention beyond the stipulated time in discharging. The

44 various clauses of the charter in this regard should be interpreted consistently, so far as possible, with this general purpose, as well as with its further presumed purpose to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and demurrage, has it in her power to enforce payment of her claims by means of that lien without a resort to the charterers. In the cases of Clink *v.* Radford (1891), 1 Q. B., 625, and Hansen *v.* Harrold (1894), 1 Q. B., 612, the relation of these

clauses to each other have been recently carefully considered in the English court of appeal, and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated; and that where "the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien, which by the charter-party the charterers are enabled to create, is not equivalent to the liability of the charterers;" and that "where the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien, which can be exercised by the ship-owner, is commensurate with such liability."

This is substantially the construction that was given by this court to the cesser clause in the case of Hatton *v.* The Belaunzaran, 26 Fed., 780, where notwithstanding the cesser clause the charterer was held liable to pay demurrage, because under the right to effect a subcharter he had required the ship to take a cargo of salt not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

In the present case the respondents, as charterers, had the
45 right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter; it means only that the charterers' obligations to the ship and owners should not be affected by the terms of the bill of lading thus signed on the charterers' requirement (Gledstanes *v.* Allen, 12 C. B., 202).

The bill of lading for the lumber in question provided for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." A bill of lading in this form imposed upon the endorsee of the bill of lading who received the goods under it none of the stipulations of the charter except such as pertained to the payment of freight (Chappell *v.* Comfort, 10 Com. B. (N. S.), 801; Smith *v.* Sieveking, 4th El. & B., 945; Fry *v.* Chartered Bank, L. R., 1 C. B., 689; Dayton *v.* Parke, 142 N. Y., 391, 400). It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or in default thereof pay a specified price per day for any further detention of the vessel. Under this bill of lading the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages, for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention from whatever cause, and agrees upon a specified rate of damages.

Had the bill of lading provided for the payment of freight and "all other conditions as per charter-party," the latter provision would have been construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and would

have included the obligations referred to in the charter-party respecting the rate of delivery and the payment of the demurrage specified, though not necessarily including independent pro-
46 visions of the charter-party relating to different subjects (Russel *v.* Nieman, 17 Com. B. (N. S.), 162; Serraino *v.* Campbell, 25 Q. B. D., 501; S. C. (1891), 1 Q. B., 283; Wagner *v.* Smith, 15 C. B., 285; Portus *v.* Whortly, L. R., 3 Q. B. Div., 534).

What the respondents, therefore, in this case virtually required the master to do was to give a bill of lading for this lumber; that required the master to deliver it to the endorsee of the bill of lading, without the payment of any charter demurrage at all, such as the respondents had agreed should be paid; but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently, or by design, is immaterial as respects the ship. For the ship could only claim of the vendee according to the bill of lading (the H. G. Johnson, 48 Fed. Rep., 696). The bill of lading required the ship to deliver the cargo contrary to that provision of the charter which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting, and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses.

Whether there was any "safe anchorage ground within the bay at which the vessel could discharge;" whether the vessel was able to perform her part of the contract "by delivering at the port of discharge according to the custom of said port," and whether
47 there was "any default on the part of the respondents or their agents in receiving the goods," must, therefore, be considered upon further evidence to be taken, as well as the alleged settlement with the master in satisfaction of all such claims.

New York, November 28, 1894.

BURRILL
vs.
CROSSMAN.

BROWN, *J.*:

The exceptions to the other parts of the answer must be overruled. The facts stated in the answer, the truth of which must be accepted on this argument, amount, in my judgment, to a complete defense. As respects the lay days, the charter provided "Lay days to commence from the time the vessel is ready to receive or discharge cargo and written notice thereof is given to the party of the second part, or agents; and for each and every day's detention or default

of the said party of the second part, or agents, $59.46 shall be paid. * * * Vessel to discharge at safe anchorage ground in Rio bay, designated by charterers."

The charter does not fix a definite time from which the lay days are to be computed in any other way than from the time that the ship is "ready to discharge and gives notice thereof." The libel states that the ship arrived at Rio on the 30th of August, and that on the 4th of September, 1893, "notice that she was ready to discharge was duly given," &c.

The answer states that "by reason of the acts of public enemies, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts and making war against Brazil, they were prevented from removing the cargo any sooner than they did," and that "the firing between said vessels of war and the forts made it impossible to remove the cargo from the said vessel any sooner than it was removed," and that after the discharge the agent of the libellants and the consignees
48 made a settlement in full satisfaction of all claims under the charter-party, and the balance found due was paid.

The substance of this defense is that by reason of the public enemy and actual warfare in Rio bay it was "impossible to remove the cargo from the vessel" sooner than was done. It was the vessel's duty "to remove the cargo from the vessel," for that is the act of discharge; and it was the consignee's duty to receive it as removed. In this case at the rate of 20,000 feet per day. The ship's duty to remove and discharge the duty and the consignee's duty to receive are concurrent duties; and where performance by either is prevented by major force neither is in "default," unless that risk has been assumed by the contract, which is not the case here (Ford *vs.* Cotesworth, L. R., 4 Q. B., 127; 6 do., 544; Kay *vs.* Field, 10 Q. B. Div., 241; Dahl *vs.* Nelson, 6 App. Cases, 38; Carsenago *v.* Wheeler, 16 Federal, 248; the Spartan, 25 Fed., 44, 51).

This case is quite different from those in which a charterer has contracted to discharge the cargo within a certain time after "arrival," and thereby takes all risks of delay. Under this contract (1) the charterer was to designate a safe anchorage ground for discharging in Rio bay and (2) the vessel was to get in readiness to discharge and then to give notice thereof, before the lay days would begin. The vessel was not bound to undertake a discharge at an unsafe place; nor was the charterer required to receive the cargo at an unsafe place, nor outside of Rio bay. No time being stipulated within which the charterer should designate a safe place of discharge, he was bound to do this within a reasonable time, according to all the circumstances (Henly *vs.* Brooklyn Ice Co., 14 Blatch., 522; Fish *vs.* 150 Tons of Brown Stone, 20 Fed., 201, and cases there cited; Parquette *vs.* Cargo of Lumber, 23 Fed., 301; the Spartan, *supra*). The answer in effect alleges that this was done as soon as possible.

The libel does not allege that the vessel was actually ready
49 to discharge at any time before the discharge actually began. It only asserts that notice of readiness was given. That is a very different thing. Such notices are often given by shipmasters

in the attempt to set demurrage running before the ship is ready or able to perform her obligation to discharge (Carsenago *vs.* Wheeler, *supra;* Tiedman *vs.* Plock, 17 Fed., 266; affd., 21 do., 349).

The plea of accord and satisfaction is also a sufficient defense. Questions of safety of the vessel in discharging, of actual ability and readiness to deliver dependent upon the circumstances existing at a distant port, are peculiarly within the province of the master, or the ship's local agent, to consider and to determine in their relations to such a question as that of demurrage; and a settlement by either with the charterer or consignee is presumptively valid and conclusive, and should only be set aside upon such special proofs as in equity would invalidate settlements with the principal, nothing of which here appears (Alexander *vs.* Dowie, 1 Hulst. & N., 152; the Gulnare, 24 Fed., 487).

The exceptions are therefore overruled.

Dated New York, December 17, 1894.

BURRILL } *v.* CROSSMAN.

This case has been twice heard upon exceptions by the libellant to the answer, upon the understanding—at least on the part of the court—that the hearing was to be treated as the trial of the cause, upon the admission of libellants' counsel in open court that the facts were correctly stated in the answer; this course being adopted in order to avoid the expense and delay of a commission to Brazil, in case the facts alleged in the answer should be held to constitute a legal defense. Two opinions have been delivered by the court after these hearings. The latter being adverse to
50 the libellants, their proctor now moves for leave to withdraw the exceptions, and to amend their libel "so as to confess and avoid, explain and add to, the new matter set forth in the answer." This, if allowed, would involve quite a substantial departure from the understanding had, at least by the court, in the previous proceedings, which would have been quite different had it been considered that any such application as the present was to be subsequently made. The only misunderstanding now alleged by the libellants' proctor I understand to be as to the scope of the words in the answer, "impossible to remove the cargo;" but on the argument and before submission, the court stated that "removal" included delivery by the ship as well as receipt by the consignee.

The last hearing was upon the admission of counsel in open court that the facts were stated with substantial correctness in the answer, viz., that naval warfare in the harbor of Rio, "made it impossible to remove the cargo sooner," which the court held to be a major force, under which the consignee or charterer was not in "default;" and further, that the facts respecting such warfare, and the extent of its interference with the vessel's discharge in a distant port, were specially within the scope of the master's authority to appreciate and determine, as the representative of the ship-owners; and that any

settlement made by him in satisfaction of freight and demurrage, or of "all claims," as alleged in the answer, was within his lawful power, and was binding upon the libellants.

The application to confess and avoid does not set up any facts inconsistent with what was admitted on the previous hearings, and stated in the answer. The affidavit does show that a safe place was at first designated, and the discharge begun; but that the discharge, after it was commenced, was suspended at different times for upward of fifty-three days, the delay claimed in the libel; and the affidavit does not affirm or suggest that this suspension
51 was not caused solely by the naval hostilities stated in the answer, or that suspension was not the necessary result of those hostilities. The affidavit, therefore, inferentially confirms the answer to this extent and the admission made on the argument. The forced interruption of the ship's power to deliver, where no time has been agreed on, stops demurrage, as much as her inability to begin would stop it. It is a case of a concurrent duty in the ship to deliver, because the charterer here did not contract to assume the risk of her inability to deliver 20,000 feet per day; and whenever she was unable to do that, no matter what the cause, she could not claim demurrage (Ford *v.* Cotesworth, L. R., 4 Q. B., 127; Riley *v.* Cargo of Iron Pipes, 40 F. R., 605; the J. E. Owens, 54 do., 185).

The application further states "an intent to allege" that the sum paid was only the amount of the freight due, and to deny the authority of the master, or of Phipps Bros. & Co., agents, to receive that sum in full satisfaction of all claims and demands, and also to deny that they had any authority to make or state an account respecting all claims under the charter-party. The denial of the master's authority is a mere question of law. The affidavit does not state that the amount paid at Rio was not there paid and received or intended as a settlement of all claims for freight or demurrage.

The libellants' counsel claims an absolute right under the 51st rule of the supreme court in admiralty to amend the libel in order to confess, avoid and explain, as above stated. Though such an amendment would undoubtedly be allowed if applied for at a proper time, no such right exists after the parties have proceeded to a hearing upon the pleadings; nor if it did, could it be allowed upon the mere affidavit of the proctor, as in this case, as to what the libellants "intend to allege," where no fact is set forth in the application incompatible with the allegations of the answer,
52 or avoiding their legal effect. As respects mere denials of such allegations, no such amendment is necessary.

The application is, therefore, denied.

Dated New York, December 31, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 9th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

The exceptions filed by the libellants herein to the sixth article of the amended answer having been brought on for argument, and after hearing the advocates for the respective parties herein, it is

Ordered, adjudged and decreed, that said exception be and the same hereby is overruled.

A. BROWN.

(Endorsed:) Order overruling exceptions. Filed Jan'y 9, 1895.

53 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George A. Black, being duly sworn, says: That he is proctor for the libellant- herein. That libellants excepted to the fifth article of the original answer (numbered VI in the amended answer), which set up as defenses a state of war at Rio, which prevented the consignee of the cargo from receiving the same, and which also set up an account stated between the master of the bark and the alleged agent of libellants, Phipps Brothers & Company, and also set up a settlement between them of all claims under the charter-party, which the said article claimed constituted a bar to this action. That the libellants desire to withdraw their exceptions and amend their libel herein under the 51st admiralty rule of the United States, so as to confess and avoid, explain and add to the new matter set forth in the answer, and for that purpose ask the court to fix a time by special order within which the libellants may so amend their said libel and within which the defendants shall answer such amendments. That by the said amendments the libellants propose to allege that at the time of giving notice of the readiness of the vessel to discharge on the 4th of September, 1893, the said vessel was actually ready to commence her discharge, and that she did, as
54 a matter of fact, on the 5th of September, haul to the anchorage designated by the charterers' agent at Rio, and did on Wednesday, the 6th of September, 1893, discharge a portion of her said cargo, which was received by the said charterer or consignee of cargo, "and on Saturday, the 9th of September, discharged a still further portion of her said cargo, and on Monday, the 11th of September, continued her discharge, all the while lying at anchorage." That the said consignee about that time requested the said vessel to haul to a dock, and that on Monday, September 11th, efforts were made to haul her into the dock, which were not successful, on account of her drawing too much water. That on Thursday, the 14th of September, a further portion of her cargo was discharged,

and the efforts were renewed to heave her into her berth. That on Wednesday, the 13th of September, the discharge was further continued, and efforts again made to heave her into her berth. That on Thursday, the 14th of September, a further portion of her cargo was discharged, and the vessel was then hove into her berth at the saw-mills in the evening and swung alongside the wharf. That on Friday, the 15th of September, and Saturday, the 16th of September, and Monday, the 18th of September, and Tuesday, the 19th of September, and Wednesday, the 20th of September, and Thursday, the 21st day of September, and Friday, the 22d day of September, and Saturday, the 23d day of September, and Monday, the 25th day of September, and Tuesday, the 26th day of September, and Wednesday, the 27th day of September, and Thursday, the 28th day of September, and Friday, the 29th day of September, and Saturday, the 30th day of September, the said discharge was continued, but not at the rate agreed upon in the said charter-party. That the said discharging was commenced again on Monday, the 16th day of October, continued on Tuesday, the 17th of October, suspended until Monday, the 23d day of October, renewed again on Friday, the 27th day of October, suspended until the 6th day
55 of November, when it was continued; suspended again until Friday, the 17th of November, when it was renewed; suspended until Friday, the 24th of November, when it was renewed, and again suspended until Tuesday, the 28th of November, when it was again renewed and completed; and that deponent has obtained the information as to the above-stated facts from the log book of said bark now in his possession. That the said libellants also intend to allege by way of avoidance in said amended libel that neither the master nor Phipps Brothers & Co. had any authority to, or did, in fact, receive from the consignees the sum of £515 6s. 5d. in full satisfaction and payment of all claims and demands under the charter-party, nor did they have any authority to make any account or state any account on behalf of libellants with the said consignees respecting all claims under the charter-party aforesaid, nor was the balance due to the libellants paid by said consignees as alleged in said fifth article of the answer, nor any more than the freight.

GEO. A. BLACK.

Sworn to before me this 18th day of December, 1894.

LAWRENCE KNEELAND,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

Please take notice that upon the foregoing affidavit and the proceeding herein, the libellants will move this court at a stated term thereof, to be held at the post-office building, in the city of New York, on the 26th day of December, 1894, at eleven o'clock in the forenoon, for an order that the libellants may withdraw their exceptions to the fifth article of the answer (sixth of the amended answer) and amend their libel so as to confess and avoid, explain and

add to the new matter set forth in the fifth article of the an-
56 swer and sixth of the amended answer, and that the said court fix the time within which such amendments may be made, and the time in which the respondents shall answer such amendments, or for such other and further relief as may be just.

Dated New York city, December 18, 1894.

Yours, &c., GEO. A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

To Messrs. Wheeler & Cortis, proctors for respondents.

(Endorsed:) Affidavit and notice of motion. Filed Jan'y 9, 1895.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 9th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Upon reading and filing the affidavit and notice of motion by libellants' proctor, for leave to amend the libel herein, and after hearing proctors for the respective parties, it is

Ordered, adjudged and decreed, that the said motion be and the same hereby is in all respects denied.

A. BROWN.

(Endorsed:) Order denying motion for leave to amend libel. Filed Jan'y 9, 1895.

57 At a stated term of the district court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 15th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Exceptions having been filed by the libellants herein to the sufficiency of the answer set up by the respondents, and said exceptions having been brought on for argument, and after hearing the advocates for the respective parties, been overruled, and a motion having been made by libellants for leave to amend the libel herein, which said motion was after argument by the respective counsel denied, now, on motion of Wheeler & Cortis, proctors for respondents herein, it is

Ordered, adjudged and decreed, that the libel herein be and the same hereby is dismissed, with costs, without prejudice to any other

libel based on different facts. And said costs having been taxed at the sum of forty-seven and $\frac{40}{100}$ dollars, on like motion it is further

Ordered, adjudged and decreed, that the respondents herein recover of the libellants said sum of forty-seven $\frac{40}{100}$ dollars, and that the stipulators for respondents' costs cause the obligations of their stipulation to be fulfilled within the time limited by the rules and practice of this court.

ADDISON BROWN.

(Endorsed:) Final decree. Filed Jan'y 16, 1895.

58 District Court of the United States for the Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Please take notice that the libellants appeal to the United States circuit court of appeals for the second circuit from the final decree entered herein on the 16th day of January, 1895.

Dated January 22, 1895.

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. Wheeler & Cortis, proctors for respondents, Sam'l H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Jan'y 24, 1895.

59 District Court of the United States for the Southern District of New York.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
GEORGE W. CROSSMAN ET AL., Respondents, Appellees.

Assignments of Error.

I. The district court erred in overruling libellants' exception to the sixth article of the amended answer.

II. The district court erred in denying libellants' motion to withdraw their exception to the sixth article of the amended answer and to amend their libel.

III. The district court erred in dismissing the libel herein.

GEO. A. BLACK,
Proctor for Libellants, Appellants.

(Endorsed:) Assignments of error. Filed Jan'y 24, 1895.

60 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 4th day of February, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

60½ United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
GEORGE W. CROSSMAN and HERMAN SIELCKEN, Respondents, Appellees.

New Proofs on Appeal.

Appeal from the district court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Sep. 23, 1898. James C. Reed, clerk.

61 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

PROVINCE OF NOVA SCOTIA, *Yarmouth,* } *ss:*

William Burrill, being duly sworn, says: That he is the managing owner of the bark Kate Burrill, and made the charter on which this action is founded, and attended to her finances. That deponent received after the said vessel had completed her discharge of cargo at Rio, a protest from the master, of which a copy is annexed, and also from Phipps Brothers & Co. two accounts, of which copies are hereto annexed, and also the remittances mentioned in said accounts, and has received no other accounts and no other remittances. That neither the master of the said bark, nor the said Phipps

Brothers & Co. had any authority to or did in fact make any
62 settlement or adjustment or compromise of the claim for demurrage herein nor was any account held in respect thereto, as deponent believes from the documents aforesaid, and from not having received any information of any such occurrence from either the said master or the said Phipps Brothers & Co., and that the said account purporting to be the account of the Companhia Industrial do Brazil, deponent verily believes was the account made up by that company, as consignees of the cargo and was for freight alone, and that there is no mention in said account of any item of demurrage.

Deponent further says that the said accounts and the protest were delivered by him to George A. Black, proctor for libellants, when the matter was put in his hands to commence the suit for damages herein.

WILLIAM BURRILL.

Sworn to before me this 23d day of February, 1895.

E. H. ARMSTRONG,
[SEAL.] *U. S. Vice and Dep'ty Consul.*

63 Dr. Messrs. Wm. Burrill & Co. in account with Phipps Brothers & Company. Cr.

1893.						
Oct. 9th.	To telegrams to Yarmouth...	21.120	Nov. 10th.	By cash received from Cia Industrial do Brazil ac.		
Nov. 16th.	To our remittance £875 0 0 at 10½d.....	20.000.000		Freight per Kate Burrill, £875 0 0 at 10½d..	20.000.000	
Dec. 13th.	To disbursement of Kate Burrill as per list..	7.137.520	Dec. 7th.	By cash received from Cia Industrial do Brazil. Balance of freight as per their statement.....	6.770.230	
" "	To commission collecting freight £26.770, $230 at 1%	267.700				
" 18th.	To telegram to Yarmouth	17.600	" 18th.	By balance	673.710	
		R.27.443.940			R.27.443.940	
Dec. 18th.	To balance £29 2 6 at 10½d....	673.710				

E. & O. E.
Rio de Janeiro, 18th December, 1893.

PHIPPS BROTHERS & CO.

64 RIO DE JANEIRO, *November* 22, 1893.

The B. B. Kate Burrill, 691 tons, Captain Wilson, in account with Companhia Industrial do Brazil, consignee.

To entry at custom-house and captain of the port ...	R. 40.000
" conferring manifest and list of stores.....	40.000
" translation of manifest and copy	22.500
" stamps	50.000
" lighterage ac....	4081.4000
" towage ac...	112.500
" commission on inward freight, 2½% on £13 0 6 5 = £34 15 2 at 10⅜	804.050
	R. 5150.450

CR.

By amount of freight as per charter-party, 466,862 ft. at 13.50 and 47,392 ft. at 13.50 minus ⅛=$6,729.17 at 4.84 = ... 1,390 6 5	
Less received 875 0 0	
£515 6 5 at 10.3⅛	R. 11920.680
Balance due vessel	R. 6770.230

E. & O. E.

Pola COMPANHIA INDUSTRIAL DO BRAZIL,
EDWIN E. FAIR, *Thesoureiso.*

65 Know all men by these presents that on this twelfth day of December, 1893, before me, W. G. Abbott, Esq., H. B. M. consul general for this city and State of Rio de Janeiro, personally came and appeared Thomas Wilson, master of the British barque Kate Burrill of Yarmouth N. S. official No. 61817, who solemnly declared and stated as follows, viz:

That his vessel the Kate Burrill arrived in Rio de Janiero from Pensacola on the 30th of August, 1893, with a cargo of lumber consigned to the Companhia Industrial do Brazil; that due written notice was handed to said consignees on the 4th of September, 1893, that said vessel was ready to commence her discharge and that her lay days would commence on that date leaving 27 days for discharging which expired on the 6th of October.

That owing to the detention of the consignees the cargo was not all discharged until the 29th of November, 1893, thus delaying the vessel 53 (fifty-three) days beyond the lay days and for which demurrage is claimed to the amount of $3,158.38 as per charter-party which the consignees refuse to pay; therefore the appearer has noted this protest which he has signed at the place and date aforesaid.

THOS. WILSON, *Master.*

(Signed) W. G. ABBOTT,
H. B. M.'s Consul General.

In testimonium veritatis.
[SEAL.] British consulate, Rio de Janeiro.
December 12th, 1893.

JAMES PARK,
Acting Vice-Consul.

66 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents, Appellees.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George A. Black, being duly sworn, says: That he is the proctor for the libellants who have perfected their appeal to this court by filing their return herein on the 18th day of February, 1895.

That in the district court libellants moved to amend their libel after the district judge had overruled the libellants' exceptions to that article of the answer which set up a state of war at Rio, and a settlement with the master and with libellants' alleged agent at Rio. That in sustaining the said defense the district judge said:

"The facts stated in the answer, the truth of which must be accepted on this argument, amount in my judgment to a complete defense."

The amendments to their libel which libellants asked to make were those provided for in the 51st admiralty rule, and deponent believed that such amendment was a matter of right, and
67 was greatly surprised when the opinion of the district judge was handed down, in which it was stated as follows:

"This case has been twice heard upon exceptions by the libellants to the answer, upon the understanding—at least on the part of the court—that the hearing was to be treated as a trial of the cause, upon the admission of libellants' counsel, in open court, that the facts were correctly stated in the answer."

That while it is true that deponent in arguing the said exceptions stated that the libellants, by the mere fact of taking the exceptions, had for the purposes of the argument admitted all that was alleged in the said arcicle of the answer, yet deponent most positively affirms that he never intended to make any other or different admission. That it is true that deponent desired to have the said exception disposed of for the reason that if the said article of the answer so excepted to was held insufficient to constitute a defense, it would prevent the necessity of issuing a commission to Rio to disprove the same, but that deponent did not intend to and did not in fact state that if the said exception was overruled, the libellants did not intend to contest the matters alleged, and deponent says that the court must have misunderstood deponent on the argument of said exception, as it has already misunderstood both deponent and counsel for respondent on the previous argument, for in its opinion dated November 28, 1894, after the words "£515.6.5 was accepted in

full satisfaction and payment of all claims under the charter-party," Judge Brown said:

"It was admitted that the amount thus paid included only a portion of the demurrage which the ship would be entitled to claim for the detention beyond the lay days if the above facts were no defense."

68 That deponent called Judge Brown's attention to those words in his opinion, and asked him to strike them out on the ground that he was mistaken and that no such admission had been made. That he at first declined to do so. That deponent thereupon obtained from the proctor for the respondents who had argued that branch of the case before Judge Brown, a statement in writing that "no admission either way" had been made, and thereupon Judge Brown did strike those words from his opinion.

Deponent further says that there was delivered to him by the libellants with other papers before this action was brought a copy of the protest certified by the British acting vice-consul at Rio de Janeiro, of the master of the bark Kate Burrill, of which a copy is annexed to the affidavit of William Burrill, and the two accounts of which copies are annexed.

Deponent further says that the libellants herein reside at Yarmouth, Nova Scotia, and that none of them are within this district, which was the reason deponent did not procure their affidavit on the motion in the district court.

GEORGE A. BLACK.

Sworn to before me this 25th day of February, 1895.

LAWRENCE KNEELAND,
Notary Public, Kings Co.

[SEAL.]

Cert. filed in N. Y. Co.

Please take notice, that upon the apostles herein and the affidavits, with copies of which you are herewith served, the libellants will move this court at a stated term thereof, to be held at the court-rooms, in the post-office building, in the city of New York, on the 11th day of March, 1895, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the libellants have leave to amend their libel in the manner prayed for in their notice

69 dated December 18, 1894, contained in said apostles, or that the libellants have such other and further relief as may be just.

Dated New York, February 19, 1895.

Yours, &c.,

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. Wheeler & Cortis, proctors for respondents.

(Endorsed:) U. S. circuit court of appeals for the 2nd circuit. William Burrill *et al. vs.* William Crossman *et al.* Affidavit and notice of motion. Geo. A. Black, proctor for libellants, 44 Pine street, N. Y. city. United States circuit court of appeals, second circuit. Filed Mar. 11, 1895. James C. Reed, clerk.

At a stated term of the U. S. circuit court, held at the court-rooms thereof, in the post-office building, in the city of New York, on the 18th day of March, 1895.

Present: Hon. William J. Wallace, presiding judge; Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

The libellants having moved to amend their libel on their
70 appeal in the manner moved for in the district court, and such motion having been heard upon the apostles and the affidavits of William Burrill and Geo. A. Black, after hearing the advocates for the respective parties, it is

Ordered, that the libellants have leave to amend their libel as moved for, and that such amendment be made within ten days from the date of this order, and that the respondents answer said amended libel within ten days after service of a copy thereof, and that the parties have leave thereafter to except or take evidence as they may be advised.

W. J. W.
E. H. L.
N. S.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill *et al. vs.* William A. Crossman *et al.* Order and notice of settlement. George A. Black, proctor for def'ts, 44 Pine street, New York city. Due service of a copy of the within proposed order and motion is hereby admitted. Dated M'ch 14, 1895. Wheeler & Cortis, proct's for resp'd'ts. United States circuit court of appeals, second circuit. Filed Mar. 18, 1895. James C. Reed, clerk.

Please take notice that the within proposed order will be presented for settlement at a stated term of this court, to be held at the court-rooms, in the P. O. building, in the city of New York, on the 18th day of March, 1895, at 10.30 a. m.

Dated M'ch 14, 1895.

GEO. A. BLACK,
Lib'ts' Proctor.

To Messrs. Wheeler & Cortis, resp'ts' proctors.

71 To the Honorable William J. Wallace, presiding judge; Honorable E. Henry Lacombe and Honorable Nathaniel Shipman, judges, of the U. S. circuit court of appeals for the second circuit:

The amended libel of William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt, owners of the bark "Kate Burrill," of Yarmouth, Nova Scotia, against George W. Crossman and Herman Sielcken, in a cause of

contract, civil and maritime, alleges and articulately propounds as follows:

I. That at the time hereinafter mentioned, the libellants were the owners of the British bark "Kate Burrill" and resided at Yarmouth, Nova Scotia.

II. That at the time hereinafter mentioned, the respondents were copartners in business with William H. Crossman (since deceased) in the city of New York, under the firm name of W. H. Crossman & Brothers.

III. That on or about the 7th day of March, 1893, the libellant, William Burrill, was the managing owner of the bark "Kate Burrill," and on that day entered into a written charter-party with the respondents under their firm name of W. H. Crossman & Brother, whereby the said bark was chartered to the said W. H. Crossman & Brother for a voyage from Pensacola, Florida, to Rio de Janeiro, Brazil, for a full and complete cargo of pitch-pine lumber, under and upon deck, and in and by said charter it was agreed in the words following:

"Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination, at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, lay days to commence from the time the vessel is ready to receive or discharge her cargo, and written notice thereof is given to the party of the second part (*i. e.*, William H. Crossman & Brother), or agent, and for each
72 and every day's detention by default of the said party of the second part (*i. e.*, William H. Crossman & Brother), or agent, fifty-nine dollars and forty-six cents, U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part (*i. e.*, W. Crossman & Brothers), or agent, to the said party of the first part, or agent."

That William Burrill was the party of the first part to said charter, and W. H. Crossman & Brother were the parties of the second part to said charter.

IV. That thereafter the said vessel was loaded by respondents at Pensacola with five hundred and thirty-four thousand one hundred and ninety-five superficial feet of pitch-pine lumber, of which sixty-seven thousand three hundred and thirty-three feet were loaded on deck, and thereafter sailed from Pensacola for Rio de Janeiro, where she arrived on or about the 30th day of August, 1893. That on the voyage by perils of the sea, which were duly excepted by said charter-party, 19,939 superficial feet of said deck-load were lost, and the said vessel at the time of her arrival at Rio de Janeiro had on board 514,256 feet.

V. That on the 4th of September, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Companhia Industrial do Brazil, the agent of the respondent at said port of Rio, who received the said cargo, but did not discharge the same at the average rate of not less than twenty thousand super-

ficial feet per running day, Sundays excepted, but on the contrary thereof, did not complete the said discharging until beyond the twenty-six days, Sundays exclusive, allowed for such discharge by said charter, and that demurrage therefor at the chartered rate of $59.46 per day amounts to the sum of $3,151.38, payment of which has been demanded by libellants from the respondents and refused.

VI. And by leave of the court, the libellants allege, that by the terms of the charter mentioned in the third article of the libel, it was provided as follows:

"Vessel to discharge at safe anchorage ground in Rio bay, designated by charterers."

73 VII. That at the time of giving the notice of her readiness to discharge her cargo mentioned in the fifth article, the said vessel was in fact ready to discharge upon the character designating a safe anchorage for that purpose.

VIII. That the charterer did designate an anchorage as required by said charter, and on the 5th day of September, 1893, the said vessel hauled to the anchorage designated by the charterers as being a safe anchorage for the discharge of the said cargo.

IX. That having hauled to the anchorage designated by the charterers, the said vessel did, on the 6th day of September, commence the discharge of her cargo, which portion so discharged was received by the said charterers, the said vessel lying at the anchorage theretofore designated by the said charterers as a safe anchorage.

X. That on Saturday, the 9th day of September, the said vessel continued the discharge of her said cargo, the same having been interrupted from the 6th of September to the 9th of September, by the said charterers, and on Monday, the 11th of September, again continued her discharge while yet lying at said anchorage. That at about this time, the consignee requested the said vessel to haul to a dock, and on Monday, the 11th of September, efforts were made to haul into the dock, which were not successful, on account of her draft being too great. That on Tuesday, the 12th of September, a further portion of her cargo was discharged and efforts renewed to heave her into a berth. That on Wednesday, the 13th day of September, the discharge was further continued and efforts again made to heave her into her berth. That on Thursday, the 14th of September, the discharge was further continued, and the vessel was then hove into her berth at the saw-mills in the evening, and swung alongside the wharf. That on Friday, the 15th, Saturday, the 16th, Monday, the 18th, Tuesday, the 19th, Wednesday, the 20th, Thursday, the 21st, Friday, the 22d, Saturday, the 23d, Monday, the 25th, Tuesday, the 26th, Wednesday, the 27th, Thursday, the 28th, Friday, the 29th, and Saturday, the 30th of September, the said discharge was continued, and cargo received by said charterer or consignee. That thereafter, the said consignee

74 discontinued receiving said cargo, and in consequence thereof the discharge of said vessel was suspended until Monday, the 16th of October, when it was commenced again, continued on

Tuesday, the 17th, suspended by the consignee again until Monday, the 23d, commenced again on Friday, the 27th of October, suspended again by the consignee until the 6th day of November, when it was resumed, suspended again by the consignee until the 17th of November, when it was resumed, suspended by the consignee until the 24th of November, when it was resumed, suspended again by the consignee until the 28th of November, when it was resumed and completed. That during all the aforesaid times at which the discharge of the cargo was suspended, the said vessel was ready and willing to discharge the same.

XI. Libellants allege that the total freight upon said cargo at the charter rates was the sum of £1,390–6–5. That the Compahnia Industrial do Brazil, the agent of respondents, on the — day of November, made up an account of the amount of freight due on said cargo, as per charter-party, charging for 466,862 feet at $13.50 per 1,000 feet, and for 47,394 feet at $13.50, less one-third, the said two items amounting to $6,729.17, and converted the same into pounds sterling at the rate of $4.84 to *to* the pound, amounting to £1,390–6–5, and credited themselves with £875 paid on account, leaving as the balance due for the said freight the sum of £515–6–5, which sum on or about the 7th day of December, the said Compahnia Industrial do Brazil paid Phipps Brothers & Company, to whom they had previously paid the said sum of £875 in advance. That there was no other account or payment made for the freight on said vessel and no amount paid for demurrage on said vessel, and no account of demurrage was ever stated between the said master or the said Phipps Brothers & Company and the agents of the respondents, and that the said sum of £515–6–5 was received in full of the freight so shown to be due, and for no other purpose. That on or about the 12th day of December, 1893, the master of the said vessel appeared before the British consul, the said vessel sailing under the British flag, and hailing from Nova Scotia, a province or colony of Great Britain, and made protest against the detention of the said vessel for the fifty-three days' demurrage beyond the lay days, stating in his said protest that he claimed therefor $3,159.38 as per charter, which the consignees refused to pay.

75 XII. Libellants allege that neither the captain nor the said Phipps Brothers and Company acquiesced in the said delay nor recognized the necessity therefor, nor accepted the payment of the said sum of £515–6–5 in full satisfaction and payment of all claims or demands under the said charter-party. Libellants deny that any account was made and stated between libellants and the consignees respecting all claims under the charter-party aforesaid, and the libellants deny that any balance was found due upon any accounting of demurrage claims, and libellants deny that any sum was paid by said consignee to said master or agents therefor, and libellants deny that the sum of £515–6–5 was accepted and received by them in full satisfaction of their demurrage claim.

XIII. Libellants allege that neither the master of the said vessel nor the said Phipps Brothers & Company had any authority to

enter into any accord and satisfaction with the said charterers or to receive the said sum paid for any other purpose than as payment of the freight due under said charter.

XIV. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore libellants pray that this honorable court will be pleased to decree the payments to libellants of the demurrage aforesaid, with interests and costs, and that libellants may have such other judgment or relief as may be just.

WILLIAM BURRILL.

Consulate of the United States, Yarmouth, N. S.

Sworn to before me, this 20th day of March, 1895.

CHARLES A. O'CONNOR,

[SEAL.] *Consul of the United States at Yarmouth, Nova Scotia.*

GEO. A. BLACK,

Proctor for Libellants, 44 Pine Street, New York City.

76 To the Honorable William J. Wallace, presiding judge, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges of the United States circuit court of appeals for the second circuit:

The amended answer of George W. Crossman and Herman Sielcken, respondents to the amended libel and complaint of William Burrill and others, owners of the bark "Kate Burrill," in a cause of contract, civil and maritime—

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the allegations contained in the second article thereof.

Third. Admits the making of the charter-party, as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of the said charter-party to the amended answer herein.

Fourth. Admits the allegations contained in the fourth article thereof.

Fifth. Denies each and every allegation contained in the fifth article thereof, except that it admits that the payment of $3,151.38 has been demanded by libellants from respondents, and refused.

Sixth. Admits the allegations contained in the sixth article thereof.

Seventh. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the seventh article thereof.

Eighth. Denies each and every allegation contained in the eighth article thereof.

Ninth. Denies each and every allegation contained in the ninth article thereof.

Tenth. Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the tenth article

thereof, except that it denies that said discharge was interrupted at any time by the charterer, and that any cargo was received by said charterer as is alleged in said tenth article.

77 Eleventh. Denies that the payment in the eleventh article of said libel averred was solely in discharge of the freight, and avers on information and belief that it was accepted and received in full satisfaction of all claims under said charter-party. Denies any knowledge or information sufficient to form a belief as to whether the master of said vessel appeared before the British consul on the 12th of December, 1893, and there made a protest, as alleged in the eleventh article thereof.

Twelfth. Denies each and every allegation contained in the twelfth article thereof, down to and including the words "charter-party" at the end of the fifth line in said twelfth article. As to the remaining statements contained in said twelfth article, respondents admit that libellants deny the truth of the statements therein denied, but deny that the statements are truthfully denied, and distinctly aver that said statements are true.

Thirteenth. Denies each and every allegation contained in the thirteenth article thereof.

Fourteenth. And further answering respondent alleges that the charter-party referred to in the libel herein contained a clause providing that the vessel should have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden as alleged in the fourth article of the libel herein, and that thereafter, and long prior to the said 4th day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo), bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, a copy of one of which is annexed hereto and made part hereof, and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo, and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel, upon the failure alleged in the fifth article of said libel,

78 of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of the charter-party.

Fifteenth. And further answering respondents allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same

any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay and recognized the necessity therefor.

Sixteenth. Further answering respondents allege upon information and belief that when the said cargo was delivered, the said agents of libellants accepted and received from the said consignee the sum of five hundred and fifteen pounds, six shillings and five pence, British sterling, in full satisfaction and payment of all claim and demand under the said charter-party, and an account was made and stated between said agents of libellants and the said consignees, respecting all claims under the charter-party aforesaid, and the balance due upon said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof.

Seventeenth. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

WHEELER & CORTIS,
Proctors for Respondents.

79 SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, deposes and says: That he is one of the respondents herein; that he has read the foregoing amended answer, and the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. W. CROSSMAN.

Sworn to before me, this 4th day of April, 1895.
[SEAL.]
JAS. MOORE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

This charter-party, made and concluded upon in the city of New York, the 7th day of March, 1893, between Wm. Burrill, managing agent for owners of the Br. bk. Kate Burrill of Yarmouth, N. S., of the burthen of 691 tons or thereabouts, register measurements, now at Barbadoes, of the first part; and Messrs. W. H. Crossman & Brother, of New York, of the second part; witnesseth, that the said party of the first part agrees on the freighting and chartering of the

whole of the said vessel (with the exception of the cabin and necessary room for the crew and stowage of provisions, sails and cables,) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Pensacola, Fla., to Rio de Janeiro, Brazil, on the terms following: The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or agent, and no lumber to be cut. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of resawn pitch pine lumber, under and upon deck; the said party of the second part agrees to pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid:

For lumber under deck:

$13.50 thirteen and one-half dollars gold, per thousand superficial feet, inch measure, intake survey.

For lumber delivered from on deck, two-thirds of the above rate; all without primage, earned and payable on proper delivery
80 of cargo at port of discharge, in British sterling, at the rate of $4.84 gold per pound sterling, in good and approved bills on London, at usance, or in cash at the current rate of exchange for the same at master's option, without credit or discount.

If required by charterers, lay days for loading not to commence before April 10th, 1893.

Vessel to proceed with all possible despatch direct to port of loading to enter upon this charter.

Vessel to haul once to loading berth, as may be required by charterers, or their agents, who have the privilege of moving her afterward by paying the additional towage.

Cargo to be furnished at port of loading at the average rate of not less than (20 M) twenty thousand superficial running feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, ($59.46) fifty-nine $\frac{46}{100}$ dollars U. S. gold (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading, within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage ground in Rio bay designated by charterers.

The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash,

less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to the charterers' agents at port
81 of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter for doing vessel's inward business.

The dangers of the seas, fires and navigation, of every nature and kind, always mutually excepted.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of the estimated amount of freight.

In witness whereof, we hereunto set our hands the day and year above written.

A commission of five per cent. upon the gross amount of this charter and demurrage, payable by the vessel and owners, due to Paul F. Gerhard & Co. and Edward Hinken's Sons upon the signing hereof, vessel lost or not lost, charter cancelled or uncancelled.

(Signed) WM. BURRILL.
W. H. CROSSMAN & BRO.

We hereby certify that this is a correct copy of the original charter-party now in our possession.

PAUL F. GERHARD & CO., *Brokers.*
By F. I. ZIMMERMANN, *Attorney.*

82

W. H. Crossman & Bro., shipping and commission merchants, New York.

Shipped in good order and well conditioned by W. H. Crossman & Bro., on board the bark called the Kate Burrill, whereof T. Wilson is master, now lying in the port of Pensacola, and bound for Rio de Janeiro, to say:

Marks.	Pieces.	Lumber.	S. ft.
		Eight thousand seven hundred and eighty-nine pieces p. p. Rio deals, containing five hundred and thirty-four thousand one hundred and ninety-five superficial feet.	
		Of the above lumber one thousand and two (1,002) pieces are on deck, containing sixty-seven thousand three hundred and thirty-three (67,333) superficial feet. Measurement unknown to master.	
Total, 8,789 pieces.			Total, 534,195.

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Rio de Janeiro (the dangers of the seas, fire, and collision excepted) unto order or to their assigns, they paying freight for the said lumber as per charter-party, dated 7th March, 1893, and average accustomed.

In witness hereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in Pensacola, the 5th day of May, 1893.

T. WILSON.

(In red ink: Consignors' copy. Not negotiable.)

83 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Exceptions to Answer.

Libellants except to the answer herein as follows:

I. To the 11th article thereof, on the ground that the same does not answer separately each separate allegation and matter contained in the 11th article of the libel, and in that the same omits to answer any but the last two allegations of said article, as required by the 23d and 27th admiralty rules of the U. S. Supreme Court.

II. Libellants except to the 14th article of said answer on the ground that the same is insufficient in the law to constitute a defence.

III. Libellants except to the 15th article of said answer, on the ground that the same is insufficient in the law to constitute a defence.

IV. Libellants except to the 16th article of said answer on the ground that the same is insufficient in the law to constitute a defence.

GEO. A. BLACK,
Proctor for Libellants, 44 Pine St., N. Y. City.

84 U. S. Circuit Court of Appeals, Second Circuit.

BURRILL ET AL., Appellants,
vs.
CROSSMAN ET AL., Appellees.

WALLACE, *Circuit Judge:*

Leave was granted to the appellants by this court to make new allegations in their libel, and the appellees having answered, the

appellants have filed exceptions to several of the articles of the a
swer upon the ground that the same are insufficient in law to con
stitute a defense. While there is no formal rule which sanction
this practice, the rules for appeals in admiralty only permitting new
allegations in pleading and new proof, and while there are objection
to a practice which may require an appellate tribunal to decide
cause in fragments, inasmuch as no objection has been made on th
part of the appellee-, and the exceptions raise important question
of law, the determination of which may relieve the parties from th
delay and expense of introducing the proofs, we proceed to examin
the exceptions, but without intending to commit the court when th
question may hereafter arise as to the propriety of the practice. W
shall not, however, consider the first exception, which relates merely
to a matter of form and does not involve substance.

The libel was filed by the owners of the bark Kate Burrill
85 to recover of the charterers fifty-three days' demurrage for
her detention at Rio de Janeiro in unloading a cargo of lumber
The charter-party was for a voyage from Pensacola, Florida, to Rio
de Janeiro, Brazil. It provided that the vessel should be consigned
to charterers' agents at port of discharge, and be discharged at the
rate of twenty thousand feet (of lumber) per day, lay days to com-
mence from the time the vessel should be ready to discharge the
cargo, and written notice thereof given to the charterers or their
agents; and that for each day of detention by default of the char-
terers or their agents $59.46 should be paid, vessel to discharge at
safe anchorage ground in Rio bay, designated by charterers or their
agents. It also contained the following clause: "The bills of lading
to be signed as presented without prejudice to this charter. Any
difference in freight to be settled before the vessel's departure from
port of loading. If in vessel's favor, in cash, less insurance. If in
charterers' favor, by captain's draft upon his consignees, payable ten
days after arrival of vessel at port of discharge. Vessel to have
absolute lien upon the cargo for all freight, dead freight and de-
murrage; charterers' responsibility to cease when the vessel is loaded
and bills of lading are signed."

The libel alleges that the vessel arrived at Rio de Janeiro, having
on board 514,256 feet of lumber, September 4, 1893, and duly gave
notice to the agents of the charterers that she was ready to discharge
and the vessel was in fact ready to discharge at that time; that the
charterers designated an anchorage as required by the charter, and
on the 5th day of September, 1893, the vessel hauled to the anchorage,
and on the 6th day of September commenced the discharge of her
cargo. It then alleges that for various periods of time between that
date and the 28th day of November, 1893, aggregating fifty-three
days, the discharge of the vessel was suspended by the consignees,
and that during all the time of suspension the vessel was ready and
willing to discharge.

86 The answer alleges that when the vessel was laden bills of
lading of similar tenor for the whole of the cargo were duly
signed by the master of the vessel, which bills of lading were duly
transferred to parties who became consignees of the cargo, and that

thereupon all liability of the charterers to the owners of the vessel under the charter-party ceased, and it became the duty of the master and owner of the vessel upon the failure of the consignees to discharge her pursuant to the terms of the charter-party to notify said consignees of the amount of demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid. The answer further alleges that when the vessel arrived at Rio de Janeiro the consignees of the cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libellants were prevented from discharging the cargo, and the respondents were prevented from receiving the same, any sooner than was done, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil; that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by said acts of the public enemy and not by any default of the respondents. It also alleges that the master of the vessel and the agents of the libellants acquiesced in the delay and recognized the necessity thereof; and that when the cargo was delivered the agents of the libellants accepted and received from said consignees a sum mentioned in full satisfaction and payment of all claim and demand under said charter-party, and an account was made and stated between them and the consignees respecting all claims
87 under the charter-party aforesaid, and the balance due upon said accounting was paid by the said consignee- to the said agents, and accepted and received by them in full satisfaction thereof. The answer sets forth a copy of one of the bills of lading. The bill of lading shows a shipment of cargo by the charterers, and provides for the delivery of the cargo upon the order of the charterers, or to their assigns, "they paying freight for the said lumber as per charter-party."

The second exception to the answer is to that part which relies upon the defense, that the liability of the charterers was to cease upon the loading of the cargo and signing of bills of lading. The question thus presented has been considered in the court below, and we concur in the opinion of the learned district judge in respect to it. That opinion so fully and satisfactorily discusses the question that we quote it, and deem it unnecessary to enlarge upon it. Judge Brown said: The provisions of the charter-party are in form contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 — per day.

The general intent of these provisions taken together manifestly is that the ship shall be paid, not only freight but demurrage for detention beyond the stipulated time in discharging. The various clauses of the charter in this regard should be interpreted consistently, so far as possible, with the general purpose, as well as with its further presumed purpose to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and
88 demurrage, has it in her power to enforce payment of her claims by means of that lien without a resort to the charterers. In the cases of Clink *v.* Radford (1891), 1 Q. B., 625, and Hansen *v.* Harrold (1894), 1 Q. B., 612, the relation of these clauses to each other have been recently carefully considered in the English court of appeal, and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated; and that where "the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien, which by the charter-party the charterers are enabled to create, is not equivalent to the liability of the charterers;" and that "where the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien, which can be exercised by the ship-owner, is commensurate with such liability."

This is substantially the construction that was given by this court to the cesser clause in the case of Hatton *v.* The Belaunzaran, 26 Fed. Rep., 780, where notwithstanding the cesser clause the charterer was held liable to pay demurrage, because under the right to effect a subcharter he had required the ship to take a cargo of salt not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

In the present case the respondents, as charterers, had the right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter; it means only that the charterers' obligations to the ship and owners should not be affected by the terms
89 of the bill of lading thus signed on the charterers' requirement (Gledstanes *v.* Allen, 12 C. B., 202).

The bill of lading for the lumber in question provided for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." A bill of lading in this form imposed upon the endorsee of the bill of lading who received the goods under it, none of the stipulations of the charter except such as pertained to the payment of freight (Chappell *v.* Comfort, 10 Com. B. (N. S.), 801; Smith *v.* Sieveking, 4th El. and B., 945; Fry *v.* Chartered Bank, L. R., 1 C. B., 689; Dayton *v.* Parke, 142 N. Y., 391, 400). It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per

day, or in default thereof pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages, for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention from whatever cause, and agrees upon a specified rate of damages.

Had the bill of lading provided for the payment of freight and "all other conditions as per charter-party," the latter provision would have been construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter-party respecting the rate of delivery and the payment of the demurrage specified, though not necessarily including independent provisions of the charter-party relating to different subjects, Russell *v.* Nieman, 17 Com. B. (N. S.), 162; Serraino *v.* Campbell, 25 Q. B. D., 501; S. C. 1891, 1 Q. B., 283; Wagener *v.* Smith, 15 C. B., 285; Portus *v.* Whortly (L. R., 3 Q. B. Dig., 534).

90 What the respondents, therefore, in this case virtually required the master to do was to give a bill of lading for this lumber that required the master to deliver it to the endorsee of the bill of lading, without the payment of any charter demurrage at all, such as the respondents had agreed should be paid; but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently, or by design, is immaterial as respects the ship. For the ship could only claim of the vendee according to the bill of lading (the H. G. Johnson, 48 Fed. Rep., 696). The bill of lading required the ship to deliver the cargo contrary to that provision of the charter, which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses."

The third exception to the answer is to that part which sets up the defense that the detention of the vessel beyond the charter period of discharging was caused by the acts of the public enemy, and not by the default of the charterers. The provision in the charter that the cargo was to be discharged at the rate of a specified quantity per day is the equivalent of the one frequently incorporated into such instruments, conditioned for the discharge of the cargo within a specified time. "When the time is definitely fixed, or is described

so as to be calculable beforehand, there is an absolute obliga-
91 tion on the charterer to have the work completed within that period whatever circumstances occur. He is answerable, although the completion may have become impossible, owing to causes which have arisen without any fault or omission on his part. Thus he bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge, Randall *v.* Lynch (2 Camp., 352); or from frost, Barrett *v.* Dulton (4 Camp., 333); or bad weather, Thiis *v.* Byers (1 Q. B. D., 244), preventing access to the vessel; or from acts of the government of the place prohibiting export, or preventing communication with the ship, Parker *v.* Hodgson (3 M. and S., 267), Blight *v.* Page (3 B. and P., 295, *n.*); and it is immaterial that the ship-owner also is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk" (Carver on Carriage by Sea, sections 610, 611). The doctrine thus stated has been frequently declared in the adjudications. Thus in Davis *v.* Wallace (3 Clifford, 131) it was said: "The settled rule is that where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be unladen within a certain number of days, it is no defense to an action for demurrage that the overdelay was occasioned by the crowded state of the docks or by port regulations, or government restraints. Detention of the vessel for loading or discharging longer than the time allowed by the contract entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time by natural causes." To the same effect
are the following authorities: Cargo ex Argos (5 P. C., 161);
92 Waugh *v.* Morris (L. R., 8 Q. B., 202); Davies *v.* McVeagh (4 Ex. Div., 265); Postlethwaite *v.* Freeland (5 Ap. C., 617); Leer *v.* Yates (3 Taunt., 387); Grant *v.* Coverdale (9 P. C., 470); Budgett *v.* Binnington (25 Q. B. D., 320).

The appellee cites several decisions holding that where a failure to perform is caused by *vis major* demurrage is not recovable: Ford *v.* Cotesworth (L. R., 4 Q. B., 127; *id.*, 5 Q. B., 544); Cunningham *v.* Dunn (3 C. P. D., 443); Riley *v.* Cargo of Iron Pipes (40 Fed. Rep., 605); the J. E. Owens (54 Fed. Rep., 185); Dahl *v.* Nelson (6 Ap. Cas., 38); Carsenago *v.* Wheeler (16 Fed. Rep., 248): the Spartan (25 Fed. Rep., 44). It suffices to say that these were cases in which no specified time was fixed by the contract within which the vessel should be discharged, but the contract provided for a discharge with customary despatch, or for a discharge after a precedent condition, such as the arrival of the ship in a proper discharging berth. Undoubtedly when the contract is silent on the subject of demurrage, it is only recoverable when made to appear that she was not discharged with customary diligence, because of some

fault or negligence on the part of the consignee, and in such a case the defense of *vis major* is a perfect answer to the action.

It is contended for the appellee- that the charterers are not liable in the present case, because by the language of the charter-party demurrage is payable only "for each day of detention by default of the charterers or their agents;" that default means negligence or willful omission; and that the facts alleged in the answer sufficiently excuse the charterers. In one sense any failure is a default, whether it arises from the omission to perform a contract or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a default. We think it was used in that sense in the present contract. In 1,600 Tons of Nitrate of Soda *v.* McLeod (61 Fed. Rep., 849), it was decided by the circuit court of appeals for the ninth circuit that a
93 charter-party which made the charterer liable for demurrage, only when caused by his default, did not relieve him from liability for delay caused by omission to perform his covenants, even though he was not guilty of negligence. The clause in the charter-party in that case was expressed identically as in the present charter-party.

The fourth exception is to that part of the answer which sets up payment of £515, 6s. 5d. to the agents of the libellants, when the cargo was delivered, in full satisfaction of all claims and demands under the charter-party. The argument advanced to sustain this exception is that the answer does not aver that the agents of the libellants to whom the payment was made had authority to accept a sum which did not include the full claim for demurrage. It suffices to meet this argument, and to dispose of the exception, that the thirteenth article of the libel states by way of an anticipatory averment that the agents had no authority to enter into any accord and satisfaction with the charterers, or to receive the sum paid for any purpose except as a payment for freight, and the answer denies this statement. This denial is the equivalent of an affirmative averment. Upon the allegations in the libel and answer the question whether there was an accord and satisfaction made by those having authority to represent the libellants therefor, is a question of fact to be determined upon a view of all the incidents of the transaction when the proofs are before the court.

We conclude that the second and third exceptions should be sustained, and the other exceptions overruled.

Ordered accordingly.

(Endorsed): U. S. cir. ct. of appeals, 2nd cir. Burrill *et al.*, appellants, *vs.* Crossman *et al.*, appellees. Wallace, C. J. United States circuit court of appeals, second circuit. James C. Reed, clerk.

94 At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms thereof at the post-office building, in the city of New York, on the 11th day of November, 1895.

Present: Hon. William J. Wallace, P. J.; Hon. E. Henry Lacombe, J.; Hon. Nathaniel Shipman, J.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

The exceptions filed by the libellants to the amended answer of the respondents herein having been argued by the advocates for the respective parties, and due deliberation had thereon, it is, on motion of Geo. A. Black, proctor for the libellants,

Ordered (1.) That the court declines to consider the first exception of the libellants to the 11th article of the answer.

(2.) That the second exception to the 14th article of the said answer specifying that the same is insufficient in the law to constitute a defense is sustained.

(3.) That the third exception to the 15th article of the answer stating that the same is insufficient in the law to constitute a defense is sustained.

(4.) That the court overrules the fourth exception to the 16th article of the answer.

W. J. W.
E. H. L.
N. S.

95 Please take notice that the foregoing proposed order will be presented to this court at the opening thereof on the 11th day of November, 1895, for settlement and entry herein.

Dated November —, 1895.

Yours, &c.,

GEO. A. BLACK,
Proctor for Libellants.

(Endorsed:) U. S. circuit court of appeals for the 2d circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Order. George A. Black, proctor lblts., 44 Pine street, New York city. United States circuit court of appeals, second circuit. Filed Dec. 5, 1895. James C. Reed, clerk.

At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-rooms, in the city of New York, on the 1st day of February, 1897.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Upon reading and filing the annexed consent, it is

Ordered, that Black & Kneeland be and they are hereby substituted as proctors for the libellants in the above-entitled action in the place and stead of George A. Black, deceased.

96 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL, JAMES BURRILL, ISRAEL K. BURRILL, ROBERT Caie, William D. Robertson, and John R. Blauvelt, Libellants,

vs.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Respondents.

It is hereby consented that Black & Kneeland be substituted as proctors for the libellants herein in the place and stead of George A. Black, deceased.

WILLIAM BURRILL.

Dated January 25, 1897.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 25th day of January, 1897, before me personally appear- William Burrill, known to me to be one of the libellants above named and to be the person who executed the above consent and acknowledged that he executed the same.

LAWRENCE KNEELAND,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court of appeals, second circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Consent &
97 order for substitution. Black & Kneeland, proctors for lib'ts, 44 Pine street, New York city. United States circuit court of appeals, second circuit. Filed Feb. 1, 1897. James C. Reed, clerk.

At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-rooms in the post-office building, in the city of New York, on the — day of September, 1897.

Present: Hon. William J. Wallace, presiding justice; Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, justices.

WILLIAM BURRILL and Others
against
GEORGE W. CROSSMAN and Others.

Upon the annexed consent of Messrs. Black & Kneeland, proctors for the libellants, and on motion of Wheeler & Cortis, proctors for the respondents herein, it is—

Ordered that a commission issue in this action directed to the American consul or vice-consul at Rio Janeiro, Brazil, to examine under oath, upon interrogatories and cross-interrogatories thereto annexed, certain employees of the Companhia Industrial do
98 Brazil in 1893, who had charge of the interest of W. H. Crossman & Brother in the consignment on the Kate Burrill, arriving at Rio Janeiro on or about August 30, 1893, whose testimony appears to the respondents herein to be material to the issues,

and that the libellants be at liberty to join in said commission. And it is further—

Ordered that said commission when executed shall be returned without delay to William Parkin, Esq., clerk of the U. S. circuit court of appeals for the second circuit, at the city of New York, State of New York.

E. H. L.

The entry of the foregoing order is hereby consented to.
New York, September 30, 1897.

BLACK & KNEELAND,
Proctors for Libellants.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill and others against William H. Crossman and others. Consent and order for commission. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed Oct. 5, 1897. William Parkin, clerk.

99 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL., Libellants,
against
GEORGE W. CROSSMAN ET AL., Respondents.

It is hereby consented and agreed that the interrogatories and cross-interrogatories to certain employees of the Companhia Industrial do Brazil, who had charge of the interest of W. H. Crossman & Brother in the consignment of the Kate Burrill, arriving in Rio Janeiro about August 30, 1893, of Rio de Janeiro, Brazil, as heretofore served upon the proctors for the respective parties herein, be used upon the commission about to issue to Rio de Janeiro, Brazil, and that all objections to such interrogatories and cross-interrogatories as to form are hereby waived and the same are hereby settled.

Dated New York, October 23, 1897.

BLACK & KNEELAND,
Proctors for Libellants.
WHEELER & CORTIS,
Proctors for Respondents.

(Endorsed:) U. S. district court, southern district of N. Y. William Burrill *et al.*, libellants, against George W. Crossman *et al.*, respondents. Consent. Wheeler & Cortis; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed Oct. 30, 1897. William Parkin, clerk.

100 The President of the United States of America to the American consul or vice-consul at Rio Janeiro, Brazil, greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner and by these presents do give you and either of you full power and authority, diligently to examine upon their corporal oath, or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed—

Certain employees of the Companhia Industrial do Brazil in 1893, who had charge of the interest of W. H. Crossman & Bro. in the consignment on the Kate Burrill, arriving at Rio Janeiro on or about August 30, 1893, as witnesses on the part of the respondents in a certain cause now pending undetermined in the United States circuit court of appeals of the United States of America for the second circuit, southern district of New York, wherein William Burrill and others are libellants against George W. Crossman and others, respondents. And we do further impower you, and either of you, to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you; and we do hereby require you and either of you before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to William Parkin, clerk of the circuit court of appeals of the United States for the 2d circuit, at the city of New York, as soon as may be convenient after the execution of this commission; and that you return the same when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorables Wm. J. Wallace, E. Henry La-
101 combe, Nathaniel Shipman, justices of the circuit court of appeals of the United States for the 2d circuit, at the city of New York, this 29th day of October, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second.

WM. PARKIN,

[SEAL.] *Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.*

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Interrogatories to be directed to certain employees of the Companhia Industrial do Brazil, who had charge of the interest of W. H. Crossman & Brother in the consignment of Kate Burrill, arriving in Rio Janeiro about August 30, 1893, of Rio Janeiro, on behalf of the respondents.

First interrogatory. What is your age, residence and occupation?
Second interrogatory. Do you remember the arrival of the bark

Kate Burrill at Rio Janeiro, from Pensacola, in August or September, 1893? Did you know of her remaining there after that date; and, if so, how long?

Third interrogatory. What was your employment or business at that time?

Fourth interrogatory. State what letter, if any, you re-
102 ceived from Phipps Brothers & Co. respecting their authority from the owners of said bark to act for her and transact the business of the ship. If you received such a letter, state when you received it, and annex the original or a copy thereof to your answer?

Fifth interrogatory. State what diligence was used by the consignees of the cargo of the Kate Burrill; that is to say, the Companhia Industrial do Brazil, in regard to receiving the cargo of the Kate Burrill, and taking the same away as it was discharged from the ship?

Sixth interrogatory. State whether or not said company had warehouse room in which to stow the cargo as fast as it was received from the ship?

Seventh interrogatory. State whether or not the captain of said vessel, Thomas Wilson, made any complaint to you or to anybody else to your knowledge, in regard to any alleged delay in the matter of receiving the said cargo by the consignees or in the matter of their discharging said cargo; if so, what did he say and to whom did he say it, and what answer was made? State the conversation as fully as you can and according to your best recollection.

Eighth interrogatory. State whether or not in the course of said conversation or conversations the consignees of said cargo said there was no room to put the lumber away on account of the trouble, or that they couldn't get the lumber clear of the saw-mill, or that they weren't selling their lumber, or that when the other vessel was there the place was filled up; that there was no place to put the lumber, or anything to that effect?

Ninth interrogatory. State whether or not the said captain made any claim upon the said consignees of the cargo for demurrage claimed to be due under the charter-party of said bark, or otherwise, by reason of delay in discharging the cargo from the said ship, or said anything to said consignees on said subject, and if so, what?

103 Tenth interrogatory. State whether or not the consignees of said ship, Phipps Bros. & Company, or any other persons for the said ship, said or wrote anything to the consignees of said cargo respecting any claim for demurrage alleged to be due under said charter-party, and if so, when and what was it? State whether or not it was said or written, if at all, before the payment hereafter mentioned? If it was in writing, annex the original or a copy thereof to your answer.

Eleventh interrogatory. The said captain made the following entry in his protest at Rio Janeiro, in December, 1893: "Demurrage is claimed to the amount of $3,158.38, as per charter-party, which the consignees refused to pay." State, according to your best recol-

lection, what took place at the time such claim, if any, was made, and at the time of such refusal?

Twelfth interrogatory. State whether or not any payment was made by the Companhia Industrial do Brazil, or by any persons on their behalf, to the consignees of said ship respecting the amount due under the charter-party for the carriage of the cargo upon the voyage from Pensacola to Rio, mentioned in the second interrogatory?

Thirteenth interrogatory. State fully what took place upon such payment, or prior thereto, respecting the amount to be paid, and what receipt, if any, was delivered thereupon?

Fourteenth interrogatory. State particularly whether or not the payment so made, if you say one was made, was paid by the said companhia and accepted by the consignees of said ship in full satisfaction for all claims under the said charter-party? State fully all that took place respecting the same?

Fifteenth interrogatory. State whether or not when said cargo was from day to day delivered to the said consignees thereof, any lien thereon for demurrage was claimed by the said captain or
104 the said consignees of said ship. State whether or not any such lien was claimed at any time, or whether any steps were ever taken by said captain or said consignees of the ship to enforce any such lien.

Sixteenth interrogatory. If you know any other matter or thing material to the issues and favorable to the respondents, state the same as fully and particularly as if you were interrogated in relation thereto.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill *et al.* against George W. Crossman *et al.* Interrogatories. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city N. Y.

Deposition of witness produced, affirmed, and examined the fourteenth day of April, in the year one thousand eight hundred and ninety-eight, at Rio de Janeiro, office of American consul general, under and by virtue of a commission issued out of the circuit court of appeals of the United States for the second circuit of New York, in a certain cause therein depending and at issue wherein William Burrill and others, owners of the bark Kate Burrill, are libellants, against George W. Crossman and Herman Sielchen, respondents.

Edwin Elkin Hime, of Rio de Janeiro, office 32 Rua Theophilo Ottoni, a merchant, aged fifty-two years and upwards, being duly and publicly affirmed, pursuant to the directions hereto annexed, and examined on the part of the respondents, doth depose and say as follows:

First. To the first interrogatory he saith, "I am fifty-two years of age, and live in Rio de Janeiro. Office being 32 Rua Theophilo Ottoni."

105 Second. To the second interrogatory he saith, "The Kate Burrill arrived on the 30th of August, one thousand eight hundred and ninety-three, and concluded her discharging on the 20th of November. I do not know her date of sailing."

Third. To the third interrogatory he saith, "I was a director of the Companhia Industrial do Brazil."

Fourth. To the fourth interrogatory he saith, "The Companhia Industrial do Brazil did receive a letter from Messrs. Phipps Brothers & Company, and I, as director, received it. In it they stated that they were the attorneys for the owners of the Kate Burrill, and I believe they (Messrs. Phipps Bros. & Co.) instructed us to hand the vessel over to them, which as far as I can recollect I refused to do, as the vessel and cargo were both consigned to the Companhia Industrial do Brazil. They also instructed Companhia I. do B. that they were not to give the captain any money, and that the accounts of the vessel had to be liquidated with them (Messrs. P. Bro. & Co.) and not with the captain. The Companhia Industrial do Brazil received two letters, one before and one after the arrival of the vessel, as far as I can recollect. I cannot find the letters and cannot recollect the date exactly, and cannot therefore, annex the original or a copy to this document."

Fifth. To the fifth interrogatory he saith, "The cargo was sold by the consignees to the saw-mill belonging to Mr. Berrogam, and the Kate Burrill went alongside the wharf of said saw-mill on the fourth of September, 1893. In the usual course of events the saw-mill would have received the quantity or more as stipulated in the charter-party."

Sixth. To the sixth interrogatory he saith, "Certainly, the said owners of the saw-mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel."

106 Seventh. To the seventh interrogatory he saith, "The captain of the vessel, Thomas Wilson, did complain that he could not discharge the cargo as fast, or in accordance with the charter-party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders, as I had to. This is my best recollection of the matter."

Eighth. To the eighth interrogatory he saith, "No mention was made in the conversation with regard to there being no room for storing the cargo; nor that they could not get the lumber clear of the saw-mill; nor that they were not selling their lumber. As far as I can recollect there was no other vessel there. There was nothing said about there being no place to put the lumber, nor anything to that effect."

Ninth. To the ninth interrogatory he saith, "The captain did mention something with regard to demurrage, and I replied to him that in conformity with his charter-party he had to deliver the cargo on shore, and as he had contracted to discharge the same (that

is, going alongside the wharf instead of doing the discharging into lighters), I had nothing to do with it."

Tenth. To the tenth interrogatory he saith, "No claim was ever presented to the Companhia Industrial do Brazil or to me as director, either by the captain or by Messrs. Phipps Bros. & Co. as attorneys for the owners of the vessel, either verbally or in writing."

Eleventh. To the eleventh interrogatory he saith, "The Com-
panhia never refused to pay the demurrage claim, as it was
107 never presented to them either by the captain or by Messrs.
P. Bros. & Co., nor had they cognizance of any such protest having been made by the captain."

Twelfth. To the twelfth interrogatory he saith, "All payments were made to Messrs. Phipps Bros. & Co. in accordance with accounts presented to them. First payment having been to the amount of £875; and the second payment, balance due as per account rendered. The last payment having been made on December 7, 1893, in accordance with receipt in our possession, which receipt was signed without any restriction whatever by Messrs. Phipps Bros. & Co., and is a receipt in full satisfaction of all claims."

Thirteenth. To the thirteenth interrogatory he saith, "No questions were raised by Messrs. Phipps Bros. & Co. with regard to the accounts presented by us, and balance was received by Messrs. P. Bro. & Co., as the Companhia Industrial do Brazil had a right to presume, in full settlement of all accounts."

Fourteenth. To the fourteenth interrogatory he saith, "I here confirm what I have already stated in interrogatories No. 12 and 13."

Fifteenth. To the fifteenth interrogatory he saith, "As stated before, the vessel went alongside the wharf on the 4th of September, and she concluded discharging her cargo on the 20th of November, and during that time no lien or claim was made for demurrage, either by the captain or by Messrs. Phipps Bro. & Co., and consequently no steps were taken to enforce such lien."

Sixteenth. To the sixteenth interrogatory he saith, "All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on
board and the bills of lading signed, the charterers' responsi-
108 bility ceases, the captain having lien on the cargo for freight
and any and every other claim. The Kate Burrill arrived just at the commencement of the revolution, which lasted until March of the following year, and during that time the Companhia Industrial do Brazil had the following vessels, all under the same style charter-party and all loaded with pitch-pine deals. That is, the British America, Captain H. H. Steel; the Don Enrique, Captain J. H. Wright, and the City of Montreal, Captain Greene, and although the three vessels were delayed here in consequence of the revolution, no claim has been made for demurrage. I further state that when settling with Messrs. Phipps Brothers & Co., I was certainly under the impression that when they received the balance due the vessel in accordance with the receipt passed by them, it was in final

settlement of all amounts due to the vessel in conformity with the charter-party."

EDWIN E. HIME.

U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Cross-interrogatories to be Propounded to the Employees of the Companhia Industrial do Brazil Examined under Commission Herein.

I. State, if you know, the date of the arrival of the bark Kate Burrill at Rio de Janeiro?

109 II. If in answer to the third direct interrogatory you say that you were in the employ of the Companhia Industrial do Brazil in September, 1893, state what position you held and what the duties of your position were?

III. Did not the Companhia Industrial do Brazil direct the captain of the bark Kate Burrill to discharge his cargo at the saw-mill?

IV. When was the discharge of the cargo of the Kate Burrill commenced, and when was it completed?

V. If in answer to the 6th direct interrogatory, you state that the Companhia Industrial do Brazil had warehouse-room, in which to stow the cargo as fast as it was received from the ship, state where such warehouse-room was situated and where the cargo was stowed as it was discharged from the ship?

VI. Was cargo received by the Companhia Industrial do Brazil from the Kate Burrill on every day, Sundays excepted, between the date of the commencement of the discharge and the date of the completion of same; if not state, if you know, on what days cargo was received from said vessel and how much was received on each day?

VII. At the time the bark Kate Burrill arrived at the saw-mill, was any other vessel then discharging cargo there? If yea, state the name of said vessel, and how long she had been there at the time the Kate Burrill arrived?

VIII. During the time the bark Kate Burrill was discharging her cargo at the saw-mill, state whether or not any other vessel came there for the purpose of discharging her cargo, and when her cargo was discharged?

110 IX. If in answer to the 12th direct interrogatory you say that payment was made by the Companhia Industrial do Brazil, or by any person on its behalf, to the consignees of the ship for carriage of her cargo, state when such payment or payments were made and the amount of same?

X. Did not the Companhia Industrial do Brazil pay to Phipps Bros. & Co. on or about the 10th day of November, 1893, the sum of R. 20,000,000, and did not said company pay to said Phipps Bros. & Co. on or about the 7th day of December, 1893, the sum of

R. 6,770,230? State whether any other payment was made by the Companhia Industrial do Brazil to Phipps Bros. & Co. for the carriage of the cargo of the Kate Burrill?

XI. If in answer to the 13th interrogatory you say that a receipt was delivered upon payment by the Companhia Industrial do Brazil, please produce such receipt and have a copy of the same annexed to your deposition.

XII. Did not the Companhia Industrial do Brazil in November or December, 1893, render to Phipps Brothers & Co. an account showing the disbursements incurred by them, as inward consignees of the vessel and balance due the vessel? If yea, produce a copy of such account and have the same annexed to your deposition.

XIII. Look at the paper annexed hereto and marked Exhibit A and state whether or not the said paper is not a true copy of an account rendered by the Companhia Industrial do Brazil to Phipps Brothers & Co. in the month of November or December, 1893; and whether the balance of R. 6,770,230 shown thereon was not paid to Phipps Brothers & Co. at or about the time of the rendering of such account?

111 XIV. Has the Companhia Industrial do Brazil received from the firm of W. H. Crossman & Brother, or from any one in their behalf, any letters or communications concerning the testimony that you were to give in this matter; if yea, produce copies of such letters or communications and have the same annexed to your deposition, and say if you have done so?

BLACK & KNEELAND,
Proctors for Libellants, 44 Pine Street, New York City.

EXHIBIT A.

Companhia Uniad Mercantil, successora de Monteiro, Hime & C., Miranda, Guimaraes & C., Marinho, Reis & C., 32 Rua Theophilo Ottoni 32 Rio de Janeiro Caixo N. 593.

RIO DE JANEIRO, *November*, 1893.

The B. B. Kate Burrill, 691 tons, Captain Wilson, in account with the Comp[a] Industrial do Brazil, consignee.

To entry at custom-house & captain of the port.....	R. 40,000
" conferring manifest & list of stores...	40,000
" translation of manifest & copy.....	22,500
" stamps.....	50,000
" lighterage ac.....	4,081,400
" towage ac.....	112,500
" cash to captain.....	
" commission on inward freight, 2½ % on £1,390–6–5 = £34.15.2 at 10$\frac{3}{4}$...	804,050
" commission on outward freight.....	
" ship chandler's ac.....	

112 To outward charges..... .....
" clearance at custom-house & captain of the port.....
To stevedore's ac..... ....
" ballast ac..... ... .

R. 5,150,450

Cr.

By amount of freight as per charter-party 466,862 ft. at 13.50 & 45,394 ft. at 13.50 minus $\frac{1}{3}$ = $6,729.17 at 4.84 = £1,390 6.5 .....
Less received £875.0.0 = £515.6.5. at 10⅜..... R. 11,920,680

Balance due vessel..... ..... R. 6,770,230

PELA COMPANHIA INDUSTRIAL DO BRAZIL, *Thesoureivo.*

E. & O. E.

(Endorsed:) U. S. circuit court of appeals. William Burrill *et al. vs.* George W. Crossman *et al.* Cross-interrogatories. Black & Kneeland, proctors for libellants, 44 Pine street, New York city.

Cross-interrogatory-.

First. To the first cross-interrogatory he saith, "The bark Kate Burrill arrived at Rio de Janeiro on the 30th day of August, in the year 1893."

Second. To the second cross-interrogatory he saith, "I was one of the directors of the Companhia Industrial do Brazil and was in charge of the office duties."

113 Third. To the third cross-interrogatory he saith, "No, as the vessel had to land her cargo either by lighters or by going alongside the wharf of the saw-mill; and as the latter course was always in benefit of the vessel, as the discharging was done more rapidly, the captain contracted with the owners of the saw-mill, and agrees to go alongside the wharf, and pay him the same amount as if discharged into lighters."

Fourth. To the fourth cross-interrogatory he saith, "The discharging commenced on the 4th of September and was concluded on the 20th of November."

Fifth. To the fifth cross-interrogatory he saith, "I did not state that the Companhia Industrial do Brazil had warehouse room, but that the purchasers had such room, which was situated on the bay of Rio de Janeiro, at Gamboa, where the vessel was alongside."

Sixth. To the sixth cross-interrogatory he saith, "The cargo was not received by the Companhia Industrial do Brazil, but was received by the purchasers, owing to the conditions heretofore described in my direct interrogation. It is perfectly impossible at this late date to give exact date and qualities discharged."

Seventh. To the seventh cross-interrogatory he saith, "As far as I

can recollect, there was no other vessel there at the time the Kate Burrill went alongside."

Eighth. To the eighth cross-interrogatory he saith, "As far as I can recollect no other vessel was alongside while she was there."

114 Ninth. To the ninth cross-interrogatory he saith, "The first payment made to Messrs. Phipps Bros. & Co., as attorneys for the owners, was of the sum of £875. The exact date I cannot recollect, but it was before the vessel had concluded discharging her cargo, and the second payment of Rs. 6,770, $230, being balance due to the vessel in accordance with account presented to Messrs. Phipps Bros. & Co., was on the 7th of December, in accordance with Messrs. P. Bro. & Co.'s receipt."

Tenth. To the tenth cross-interrogatory he saith, "The first payment of Rs. 20,000$ to Messrs. P. Bro. & Co. corresponds to the £875 as stated in the previous answer, and which no doubt was made as stated in the 10th interrogatory, that is, on the 10th of November, 1893, and the second payment of Rs. 6,770 $230 on the 7th of December, 1893. No other payments were made by the Companhia Industrial do Brazil to Messrs. Phipps Bros. & Co. for the carrying of the cargo of the Kate Burrill. The difference of Rs. 5,150 $450 as shown in the account presented, is for disbursements in said accounts, that is lighterage, commission, towage, custom-house duties, etc."

Eleventh. To the eleventh cross-interrogatory he saith, "The receipt is on one of the pages of the vessel's book of vessels consigned to the Companhia Industrial do Brazil. I therefore furnish you with said book with the privilege of making certified copies of same."

Twelfth. To the twelfth cross-interrogatory he saith, "The reply to this is embodied in the interrogatory immediately proceeding, namely, the eleventh."

Thirteenth. To the thirteenth cross-interrogatory he saith,

115 "I have examined the accounts annexed hereto marked 'Exhibit A' and find that they are in strict conformity with the entries in my book."

Fourteenth. To the fourteenth cross-interrogatory he saith, "The Companhia Industrial do Brazil does not exist any more, and I have not received directly or indirectly any communication from Messrs. W. H. Crossman & Brothers with reference to this matter; but I have to state that shortly before this, Mr. J. T. Lewis, United States vice-consul general at Rio de Janeiro, called on me with reference to this matter, and handed said document to me for my perusal, and this is all I have to say in the matter."

EDWIN E. HIME.

Examination taken, reduced to writing and by the witness subscribed and affirmed to this fourteenth day of April, 1893, before

EUGENE SEEGER,
Consul General, Commissioner.

116 B. B. Kate Burrill (Captain Wilson).

To entry at custom-house & captain of port	Rs. 40,000
Conferring manifest & list of stores	40,000
Translation of manifest & copy	22,500
Stamps, and C. H. officer	50,000
Lighterage ac	4,081,400
Towage ac	112,500
Cash to captain	
Commission on inward freight	
2½ on £1,390–6–5 £34–15–2 10⅜	804,050
Ship chandler's ac	
Outward charges	
Clearance at custom-house & captain of port	
Stevedore's ac	
Ballast ac	
	Rs. 75,150,450

Cr.

Freight:

466,862 ft. at $13.50	6,302.63		
47,394 " " 13.50 minus ⅓	426.54		
	$6,729.17 at 4.84		
	£1,390–6–5 Ex.		
Less received	£875–0–0		
	£515–6–5 Ex. 10⅜	11,920	$680
Balance due		6,770	$230

Received balance as above.
Rio de Janeiro, 7th of December, 1893.
(Signed) PHIPPS BROTHERS & CO.

117 At the execution of a commission for the examination of witnesses, wherein

William Burrill and others are libellants against George W. Crossman *et al.*, respondents—

This paper-writing was produced and shown to Edwin Elkin Hime and by him deposed unto at the time of his examination, before

EUGENE SEEGER,
Consul General, Commissioner.

The examination of this commission appears in certain schedules hereunto annexed.

EUGENE SEEGER,
Consul General, Commissioner.

(Endorsed:) U. S. district court, southern dist. of New York. William Burrill *et al.* against George W. Crossman *et al.* Commis-

sion to Rio Janeiro. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed May 17, 1898. William Parkin, clerk.

118 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Depositions on behalf of libellants, taken by consent at the office of Messrs. Black & Kneeland, No. 45 Pine street, New York city, February 1, 1897.

Present: Mr. Cortis, for the claimant; Mr. Kneeland, for the libellants.

It is stipulated that the depositions may be taken in shorthand, signing, filing and certificate of notary waived, stenographer's fees to be taxed.

THOMAS WILSON, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. KNEELAND:

Q. Where do you reside?
A. Belfast, Ireland.
Q. Your occupation?
A. Sailor.
Q. You are now connected with a line of steamships on the other side?
A. Yes, sir.
Q. Were you in command as master of the bark Kate Burrill on her voyage from Pensacola to Rio in 1893?
A. Yes, sir.
Q. When you left Pensacola you had a cargo of lumber?
A. Yes, sir.

119 Q. Did you have any letter addressed to your consignees at Rio?
A. Yes, sir.
Q. Who were those consignees?
A. Campanhia Industrial do Brazil.
Q. What date did you arrive in Rio?
A. August 30th.
Q. What did you first do there after your arrival?
A. After I got a visit from the doctor, I went ashore and reported myself and ship to the consignees.
Q. Then what was done with your vessel?
A. Towed with a towboat to the measuring ground.
Q. You stayed there how long?

A. Three or four days.
Q. As required by the regulations there?
A. Yes, sir.
Q. When did you report, if at all, to the consignees of the cargo?
A. On the 4th of September.
Q. What did you do on that occasion?
A. Gave them written notice that I was ready to discharge cargo, and to receive the same.
Q. Have you a copy of that notice?
A. No, sir; I have not. I had a copy of it but I haven't it now.
Q. Have you lost it?
A. Yes.
Q. Did you receive any instructions from them at that time?
A. Yes, sir; received instructions to tow into the saw-mill and discharge my cargo.
Q. When did you go to the saw-mill?
A. I don't remember the date now.
Q. Did you proceed right away to the saw-mill, or to where you were ordered?
A. I forget now whether we went in that day or not.
Q. That day or the next day did you go?
A. It was the next day, I think.
Q. Did you go up to the dock?
A. No, within a short distance of it.
Q. What was the trouble?
A. There wasn't enough water to get in to the dock.
Q. When was anything done as to discharging your cargo first?
A. On the 6th.
120 Q. How was the cargo then discharged that was taken off?
A. Into small lighters and taken from the ship on to the wharf.
Q. Was more than one lighter-load taken that day?
A. Just one lighter.
Q. When was the next cargo taken?
A. On the following Saturday. There was two days they didn't send any lighter.
Q. The following Saturday there was some cargo taken off?
A. Yes, one small lighter.
Q. From what part of the vessel was that cargo taken?
A. Deck cargo.
Q. Did they continue to discharge your cargo each day after that for a while?
A. Yes, for a while.
Q. When did you get your deck cargo off?
A. On the 14th.
Q. Then did you get up to the dock?
A. Yes.
Q. Before that had you attempted to get to the dock?
A. Yes, sir; every day we had tried; every time they took a lighter-load off we always tried to get her in.
Q. On the 14th of September you got to the dock?
A. Yes.

Q. What other vessels were there at the time at this dock?
A. There was another Nova Scotia vessel discharging lumber.
Q. She got in there ahead of you?
A. Yes, she was there a fortnight ahead of me.
Q. Did any other vessel come?
A. A Norwegian bark.
Q. Where was this dock?
A. It is on the outskirts of the town, about say two miles.
Q. Above or below the city?
A. Above the city.
Q. Did they continue to discharge each day except Sunday for a while, and if so for how long?
A. Yes, from the 11th till about the 30th of September they continued.
Q. Then was the discharge of the cargo suspended for a while?
A. Yes.

121 Q. At the time you gave the notice on the 4th of September state whether or not you were actually ready and in condition to discharge the cargo?

A. Yes.
Q. Did you keep your crew all the time?
A. Yes, sir.
Q. Did they during this time down to the 30th of September receive the cargo as fast as you were prepared to discharge it?
A. No, sir.
Q. Did you make any objection to the slowness of the discharge of the cargo?
A. Yes.
Q. To whom?
A. The consignees.
Q. What was the answer to your complaint?
A. They told me as soon as that other vessel got out they would take the cargo out as fast as we could discharge her.
Q. Did they, during this period, through September, discharge the cargo as fast as at the rate of 20,000 feet a day?
A. No, sir.
Q. Were you during each and every one of those days ready and able to discharge the cargo faster than the consignees received it?
A. Yes.
Q. After the 30th of September was the discharge of your cargo continued?
A. No, sir.
Q. Why not?
A. They hadn't warehouse-room to put the cargo away from the ship.
Q. They did subsequently discharge cargo from you?
A. Yes, sir.
Q. And at that time what was the condition of the wharf at which the cargo was being discharged?
A. It was pretty well piled up with lumber by the saw-mill.
Q. When the discharge of your cargo was suspended after the

30th of September did you make any complaints to the consignees concerning the same?

A. Yes.

Q. What answer did they make?

A. They said there was no room to put the lumber away on account of the trouble; they couldn't get the lumber clear of the sawmill; they weren't selling their lumber. When the other vessel was there the place was filled up; there was no place to put it.

122 Q. When was the discharge of your cargo completed?

A. On the 28th of November, I think.

Q. Can you without refreshing your recollection at all state in detail the days on which cargo was discharged and received by the consignees?

A. No, not without reference to the log I couldn't name all the days.

Q. Who kept the log?

A. The mate.

Q. Was he a careful man?

A. Yes.

Q. Did you see the entries when they were made, or shortly after they were made?

A. Yes, sir.

Q. Do you know whether the entries as made by the mate in the log are correct or not?

A. Yes, sir.

Q. Is the mate living?

A. No, sir.

Q. When did he die?

A. He died at sea.

Q. On the voyage back?

A. On the voyage home from Rio to St. John.

Q. Can you refer to the log and refreshing your recollection therefrom state the days upon which this vessel discharged cargo and the consignees received the same and the number of pieces which were discharged and received on each day?

A. Yes, sir; by the log book I can.

Q. When did you engage this mate?

A. I engaged him in Rio.

Q. You had discharged your mate?

A. I discharged the mate I had down from Pensacola to Rio.

Q. For drunkenness?

A. Yes, sir.

Q. Is this the log of the vessel I show you?

A. Yes, sir; that is the log.

Q. And the entries made by the mate therein you know to be correct?

A. I know to be correct, yes.

Counsel for libellant offers in evidence the entries in the log from Wednesday, August 30, 1893, to Tuesday, November 28, 1893, and the log is marked Libellants' Exhibit 1 of this date.

123 Q. Did you make any claims upon the consignees of this cargo for demurrage?

A. No, sir; I didn't make any claim.

Q. Did you make any statement to them that you intended to claim demurrage?

A. Yes.

Q. What answer did they make?

A. They said on account of the revolution I couldn't claim any demurrage.

Q. Did you ever see any account rendered by the consignees of the cargo for the amount which they claimed was due for freight and demurrage?

A. No, sir.

Q. You had nothing to do with the collection of the freight?

A. No, sir.

Q. By whom was that collected?

A. Phipps Bros. & Co.

Q. Before leaving port did you note a protest before the British consul?

A. Yes.

Q. Is this your copy of the protest which I show you?

A. It is.

Q. It bears your signature?

A. Yes.

Q. And that protest was noted before the British consul on what date?

A. On the 12th of December.

The protest is offered in evidence and marked Libellants' Exhibit 2 of this date.

Q. Did you know of a revolution being on in Rio while you were there?

A. Yes, I knew it.

Q. When did the revolution or hostilities break out, before or after your arrival?

A. After my arrival.

Q. Before or after you had reported to the consignees and were ordered to this wharf to discharge?

A. It broke out after I gave the notice.

Q. During all the time that you lay at that wharf up to the completion of your discharge on the 28th of November, was there ever any firing in the harbor or any act or hostilities which prevented the discharge by you of the cargo of your vessel or the receipt of the same by the consignees?

A. No, sir.

124 Q. Did any shots come your way at all?

A. No, sir, none.

Q. During all this period you kept your crew?

A. Yes.

Q. Ready to discharge the cargo?

A. Yes, ready to discharge the cargo.

Q. And in case any of your crew were sick state whether or not you hired extra men to take their places?

A. Yes, sir.

Q. About how far from the actual scene of hostilities and the firing on the forts in the harbor of Rio were you lying?

A. From the forts we were lying about five miles.

Q. Were there any war vessels between you and the forts?

A. Yes, sir.

Q. Where was most of the foreign shipping lying?

A. Just outside where I was; just outside at anchor.

Q. They were between you and the firing?

A. Yes, sir; all the foreign men-of-war, English, French and Italian, were all lying outside of the merchant ships.

Cross-examined by Mr. CORTIS:

Q. In whose handwriting are the entries in this log?

A. The chief officer's.

Q. All of them?

A. Yes, sir.

Q. I notice here under date of September 5th:

"Hove up anchor and hauled to saw-mill. Had a h—— of a t—— with Murphy, both mates drunk."

Q. Whose handwriting is that in?

A. That is the mate.

By Mr. KNEELAND:

Q. Which mate?

A. The mate I had from Pensacola down to Rio.

125 By Mr. CORTIS:

Q. Is he one of the mates he refers to when he says "both mates drunk"?

A. Yes. The chief mate and the second mate.

Q. Did one of the drunken men make that entry?

A. Yes.

Q. He was referring to himself, then, was he?

A. He was referring to himself and the second mate.

Q. Did you discharge him after that?

A. Yes, sir.

Q. How soon after?

A. On the following Sunday he left the ship.

Q. Did you hire a new mate at once?

A. Yes, sir.

Q. Have any trouble with him?

A. No, sir.

Q. Did you report from day to day to Phipps & Co. about the progress that was being made in the discharge of the cargo?

A. No, sir.

Q. They were your agents, weren't they?

A. Yes.

Q. You gave them no information as to how the ship was discharging, did you?

A. Yes, sir; sometimes.

Q. Did you say anything to them about claiming demurrage from the consignees?

A. Yes, sir.

Q. Did you ask them to claim demurrage?

A. No, sir.

Q. What did you say about demurrage to them?

A. I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up.

Q. Who did you say that to?

A. The manager in Phipps' office.

Q. What did he say to you in reply?

A. He didn't say anything.

Q. Did you furnish him any figures as to demurrage?

A. No, sir.

Q. Did you make any demand on the consignees for demurrage?

A. No, sir.

Q. Did anybody that you know of down there?

A. No, sir.

126 Q. Then why did you make this entry in the protest:

"Demurrage is claimed to the amount of $3,158.38 as per charter-party, which the consignees refuse to pay."

A. I told them they would have to pay demurrage and they said they couldn't do it on account of the revolution.

Q. Whom did you tell that?

A. The consignees.

Q. Then why do you say that you never asked them for demurrage? You said a moment ago that you never demanded demurrage from the consignees; did you or didn't you?

A. Yes, as soon as our lay days were up I went to the consignees and told them they would have to pay demurrage and they said we couldn't claim any demurrage on account of the revolution.

Q. At the end of the discharge did you make any claim for demurrage from the consignees?

A. That is the time I went to them.

Q. You said at the end of the lay days?

A. When the lay days were up.

Q. When the ship was entirely discharged did you go again and claim demurrage?

A. No, sir.

Q. Did you tell them at any time that there was $3,158.38 demurrage bill?

A. I don't recall whether I told them about that or not.

Q. Did you say anything to them about the amount of demurrage?

A. I couldn't say, I am sure; I can't recollect; it is a long time ago, you know; three years.

Q. Did you furnish any information at all to Phipps & Co. to enable them to send their account to the consignees of the cargo?

A. No, sir.
Q. How was the cargo discharged from the ship?
A. Discharged out of the bow ports on to the wharf.
Q. Who discharged it?
A. The crew of the ship.
Q. The consignees' men took it from the ship?
A. Yes, took it from the bows of the ship.

Q. The consignees' men stood on the wharf and your men
127 stood on the ship; and is that the way it was done?

A. Yes, they had a stage from the bow of the ship on to the wharf. My men shoved it up through the bow ports of the ship and the consignees' men received it from the bow of the ship.
Q. Was this the first time that you have ever been on demurrage?
A. Yes, sir.
Q. Didn't you know that your charter-party called for demurrage so much a day, day by day?
A. Yes, sir.
Q. Why didn't you make your demand each day for your demurrage?
A. I didn't think it was any use on account of what they said when I told them about the demurrage.

Redirect examination by Mr. KNEELAND:

Q. You say you did call on them when the lay days were up?
A. Yes, I went right up there.
Q. And they told you then that they did not intend to pay any demurrage?
A. Yes, on account of the revolution I was not entitled to it.
Q. Did you from time to time call at the office?
A. Yes.
Q. And make any claim for demurrage?
A. Just the same story all the time, every time I went up.
Q. You reported to Phipps Bros. when the discharge of your cargo was completed, did you not?
A. Yes, sir.
Q. Did you ever have any conversation with the manager or anybody connected with Phipps Bros. about the detention of this vessel?
A. Yes, I had a short conversation with them.
Q. What did you say?
A. I said the consignees ought to pay the demurrage for detaining the vessel so long.
Q. What did they say?
A. They said they didn't know.

128 WILLIAM BURRILL, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. KNEELAND:

Q. You are one of the libellants herein?
A. Yes.
Q. Who were the owners of the bark Kate Burrill at the time mentioned in the pleadings?
A. Myself, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt; I think that covers all the owners.
Q. All residing at Nova Scotia?
A. Yes, all reside in Yarmouth county, Nova Scotia.
Q. Who collected the freight of the vessel on this voyage at Rio?
A. I presume Phipps Bros. & Co. collected the freight.
Q. They remitted it to you?
A. Yes.
Q. In remitting that freight to you did they also send you a copy of the statement rendered by the consignees, the Companhia Industrial do Brazil?
A. Yes.
Q. Will you look at the paper I show you and state whether that is the paper that was sent to you by Phipps Bros. & Co.?
A. Yes, sir.

The paper is offered in evidence.

By Mr. CORTIS:

Q. This was a copy of the account they rendered to the company?
A. This was rendered for us to our agents, and they sent it to us.
Q. That was rendered by the company to Phipps Bros.?
A. Yes.

The paper is marked Libellants' Exhibit 3 of this date.

By Mr. KNEELAND:

Q. Look at the paper which I show you and state whether that is the account of Phipps Bros. & Co. with yourself, which was
129 accompanied by this statement, Libellants' Exhibit 3?
A. Yes.

The paper is offered in evidence.
Objected to as irrelevant and immaterial.
It is marked Libellants' Exhibit 4 for identification of this date.

Q. Previous to your receipt of Libellants' Exhibit 3 had you received from Phipps Bros. & Co. a remittance on account of the freight?
A. Yes.

Mr. CORTIS: I object to all this line of testimony.

Q. Did you ever receive from Phipps Bros. & Co. any remittance on account of demurrage?

Objected to.

A. No; those are the only two documents we ever received.

Q. Did you ever receive from them any account showing the sums received by them for freight, or otherwise, than the paper which is marked Libellants' Exhibit 4 for identification?

A. Those are the only papers we ever had from Phipps Bros. & Co., those two; and the vouchers in connection with them.

Cross-examined by Mr. CORTIS:

Q. Did you or any of your associates give your captain any instructions as to demurrage before he sailed?

A. No.

Q. Did you give Phipps Bros. any instructions as to claiming demurrage?

A. I wrote Phipps Bros. & Co. after seeing there was a revolution at Rio, that if the vessel was detained they should claim demurrage. But at that time I wasn't aware that the bill of lading didn't refer to the charter-party. If I had known that of course I would have known too much to ask them to collect demurrage.

130 Q. Did you get any reply to that letter?

A. The bill of lading in this case wasn't a customary one.

Q. Did you get any reply to that letter to Phipps Bros.?

A. I got a reply, yes.

Q. What did they say?

A. That would be about the time the ship was sailing, and I forget just what they said. I think they referred to hostilities being on there.

Q. Have you that reply?

A. I haven't it here.

Q. Can you produce it?

A. I think I can.

Mr. Cortis calls for the production of that letter.

Q. Can you state the substance of it from your recollection?

A. No, I cannot.

Q. Did they say they had or that they had not demanded demurrage?

A. They never demanded demurrage. It was in reply to my letter. I think I said I might have a claim against the Brazilian government on account of the charter-party not referring to hostilities. I have got a copy of my letter to them.

Q. Will you send to Mr. Kneeland a copy of that letter and also their reply?

A. Yes, if I can find them.

LIBELLANTS' EXHIBIT 1, LOG BOOK.

Laying at Rio de Janeiro.

Wednesday, Aug. 30, 1893.

Wind light N. E., raining. Started to unbend sails. At 11 a. m. hove up anchor and towed to measuring ground. Came to at 1 o'clock in 8 fathom of water. 30 fathom to hawse pipe. Cunningham night watch. At dark thick and rainy. Pumps and riding light attended to.

131 Thursday, Aug. 31.

Wind light. E'ly. Unbent sails and put away. Middle and later part light wind N. E. and cloudy. Pumps and riding light attended to.

Friday, Sept. 1st.

Wind light S. E. and clear. Employed in scrubbing ship outside. Pumps and riding light attended to.

Saturday, Sept. 2d.

Wind light e'ly and clear. Scrubbing ship 10 a. m. Hove up 15 fathoms chain to go to wharf, didn't go all the same. D. H. Pumps and lights attended to.

Sunday, Sept. 3d.

Wind moderate N. E. and cloudy. Being Sunday no work. Pumps, riding light and watchman attended to.

Monday, Sept. 4th.

Wind light N. E. Variously employed.

Tuesday, Sept. 5th.

Hove up anchor and hauled to saw-mill. Had a H. of a T. with Murphy. Both mates drunk.

Wednesday, Sept. 6th.

Put out 150 deals. Getting sober. Cloudy and rainy.

Thursday, Sept. 7th.

Wind N. E. Cloudy and rainy, Crew employed scrubbing out cabin and forecastle. Day end same.

Friday, Sept. 8, 1893.

Wind light S. E. Crew employed scraping yards, latter part of day cloudy and misty. Pumps attended to.

132 Saturday, Sept. 9th.

Wind S. W. light. Cloudy and misty, discharged 155 deals. Pumps attended to.

Sunday, 10th Sept., '93.

Light airs and sultry weather. Vessel still lying off the saw-mills. Pumps and riding light strictly attended to. Cunningham watchman.

Monday, 11th Sept., '93.

Light airs. Hot and sultry weather. Discharged 105 deals (of deck-load). Ship still lying off the saw-mills. Pumps and light strictly attended to. Joined ship this day. Crew engaged discharging cargo part of day, the remainder of day employed in filling water, and trying to heave the vessel into berth. Cunningham watchman.

J. PAGE, *Mate.*

Tuesday, 12th Sept., '93.

Light airs and fine weather throughout the day; discharged 105 deals (off the deck-load). Crew employed the remainder of the day in scraping yards and trying to heave ship into berth. Pumps and light strictly attended to. Cunningham watchman.

Wednesday, 13th Sept., '93.

Mod. breeze and fine and clear weather. Discharged 115 deals, (60 of the deck-load) and the remaining 55 out of (the hallyways at poop, making in all 739 deals (all the deck-load). Pumps and light strictly attended to. Crew employed in discharging cargo and heaving vessel into berth at saw-mills. Was successful this evening and moved alongside wharf. Cunningham watchman.

Friday, 15th Sept., '93.

Hot, sultry weather, discharged 142 deals. Pumps strictly attended to. Cunningham watchman.

133 Saturday, 16th Sept., '93.

Fresh breeze and showery throughout the day. Discharged 173 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 17th Sept., '93.

Hot and sultry weather and no wind. No cargo worked today, it being the Sabbath. Pumps strictly attended to. Cunningham watchman.

Monday, 18th Sept., '93.

Mod. breeze and showery throughout the day, discharged 265 deals. Pumps strictly attended to. Cunningham watchman.

Tuesday, 19th Sept., '93.

Light airs and showery in the morning. Cleared up towards evening. Discharged 262 deals. Pumps strictly attended to. Cunningham watchman.

Wednesday, 20th Sept., '93.

Fine weather throughout the day. Discharged 117 deals. Pumps strictly attended to. Cunningham watchman.

Thursday, 21st Sept., '93.

Mod. breeze and showery throughout the day, discharged 160 deals. Pumps strictly attended to. Cunningham watchman.

Friday, 22d Sept., '93.

Light breeze and fine and dry weather. Discharged 239 deals. Pumps strictly attended to. Cunningham watchman.

134 Sat., 23d Sept., '93.

Hot and sultry weather throughout the day, discharged 226 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 24th Sept., '93.

Hot and sultry weather throughout the day. No cargo worked. Pumps strictly attended to. Cunningham watchman.

Monday, 25th Sept., '93.

Fresh breeze and showery throughout the day. Discharged 127 deals. Pumps and light strictly attended to. Cunningham watchman.

Tuesday, 26th Sept., '93.

Fresh breeze and much rain the first part of day, and moderated towards evening. Discharged 380 deals. Pumps strictly attended to. Cunningham watchman.

Wednesday, 27th Sept., '93.

Hot and sultry weather, discharged 257 deals. Pumps strictly attended to. Cunningham watchman.

Thursday, 28th Sept., '93.

Weather still hot and sultry with light airs of wind, discharged 345 deals. Pumps strictly attended to. Cunningham watchman.

Friday, 29th Sept., '93.

Mod. breeze and heavy rain. Discharged 499 deals. Pumps strictly attended to. Cunningham watchman.

135 Saturday, 30th Sept., '93.

Showery throughout the day, wind very light, discharged 360 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 1st October, '93.

Light air and wind and showery throughout the day. Pumps strictly attended to. Cunningham watchman.

Monday, 2d October, '93.

Strong breeze and showery. Hands employed scraping yards and passing water from the shore. Pumps strictly attended to. Cunningham watchman.

Tuesday, 3d October, '93.

Mod. breeze and fine weather throughout the day. Hands employed in scraping yards. Pumps strictly attended to. Cunningham watchman.

Wednesday, 4th October, '93.

Hot and sultry the first part of day with wind and rain during the latter part. Hands employed in scraping yards. Pumps strictly attended to. Cunningham, watchman.

Thursday, 5th October, '93.

Heavy squalls of wind and rain throughout the day. Moderated at midnight. Hands employed at oiling yards, &c. Pumps strictly attended to. Cunningham, watchman.

Friday, 6th October, '93.

Light winds and showery. Hands variously employed. Pumps strictly attended to. Cunningham watchman.

136 Sat., 7th Oct.

Strong breeze and heavy rain all day. Hands employed in passing water from shore. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 8th Oct., '93.

Showery all day and much lightning towards midnight. Pumps strictly attended to. Cunningham watchman.

Monday, 9th Oct., '93.

Mod. breeze throughout the day and showery towards evening. Darcy, A. B. went this day to hospital, he having been drunk on Sunday and fighting. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Tuesday, 10th Oct., '93.

Hot and sultry all day. Crew variously employed. Pumps carefully attended to. Cunningham watchman.

Wed., 11th Oct., '93.

Heavy rain all day. Crew employed in passing water, &c. Pumps strictly attended to. Cunningham watchman.

Thur., 12th Oct., '93.

Strong winds and showery. Crew employed chipping chain plates. Pumps carefully attended to. Cunningham watchman.

Frid., 13th Oct., '93.

Mod. breeze and fine weather throughout the day. Hands chipping chain plates and all the chain-work forward. Pumps strictly attended to. Cunningham watchman.

137 Sat., 14th Oct., '93.

Light airs and hot and sultry weather. Crew employed in chipping iron. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 15th Oct., '93.

Hot and sultry all day, light breeze towards evening. Pumps strictly attended to. Cunningham, master.

Monday, 16th Oct., '93.

Strong breeze and showery throughout the day, discharged 434 deals. Pumps strictly attended to. Cunningham watchman.

Tuesday, 17th Oct., '93.

Mod. breeze and fine weather throughout the day, discharged 163 deals, pumps strictly attended to. Cunningham watchman.

Wed., 18th Oct., '93.

Light airs, hot and sultry weather throughout the day, pumps strictly attended to. Cunningham watchman. Crew employed chipping chain gear forward.

Thur., 19th Oct., '93.

Mod. breeze and showery. Crew employed chipping and passing water from the shore, pumps strictly attended to. Cunningham watchman.

Frid., 20th Oct., '93.

Hot and sultry weather throughout the day. Crew employed in painting chain plates and chain gear forra-d. Pumps strictly attended to. Cunningham, watchman.

138 Sat., 21st Oct., '93.

Hot and sultry weather throughout the day. Crew employed in painting ship outside. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 22d Oct., '93.

Mod. breeze and cloudy weather, much rain towards midnight, pumps strictly attended to. Cunningham watchman.

Mon., 23d Oct., '93.

Strong breeze and showery throughout the day, discharged 136 deals, pumps strictly attended to. Cunningham watchman.

Tues., 24th Oct., '93.

Light breeze and fine weather. Crew employed in painting ship outside. Pumps strictly attended to. Cunningham watchman.

Wed., 25th Oct., '93.

Mod. and fine throughout the day, discharged 413 deals, pumps strictly attended to. Cunningham watchman.

Thur., 26th Oct., '93.

Light breeze and hot and sultry weather. Crew employed in passing water from shore and scrubbing ship's side. Pumps strictly attended to. Cunningham watchman.

Frid., 27th Oct., '93.

Mod. breeze and fine weather throughout the day, discharged 356 deals, pumps strictly attended to. Cunningham watchman.

139 Sat., 28th Oct., '93.

Strong breeze and showery. Crew employed in chipping iron knees in b-tween-decks, pumps strictly attended to. Cunningham watchman. Murphy, A. B. sick this day after effects of drink, he having fallen into water the previous evening while drunk.

J. PAGE, *Mate.*

Sunday, 29th Oct., '93.

Hot and sultry weather throughout the day, pumps strictly attended to. Cunningham watchman. Murphy still laid up.

Monday, 30th Oct., '93.

Mod. breeze and showery. Crew employed chipping iron knees, &c., in 'tween-decks. Murphy, A. B. sick today again. Pumps strictly attended to. Cunningham watchman.

Tuesday, 31st Oct., '93.

Light breeze. Hot and sultry weather. Crew employed in chipping in lower hold. Murphy laid up. Pumps strictly attended to. Cunningham watchman.

Wed., 1st November, '93.

Strong winds with rain. Crew employed in chipping iron knees in lower hold. Murphy laid up. Pumps strictly attended to. Cunningham watchman.

Thur., 2nd November, '93.

Fresh breeze and dry weather throughout the day. Crew employed in lower hold chipping iron knees, &c. Pumps strictly attended to. Cunningham watchman. Murphy laid up.

Frid., 3rd Nov., '93.

Hot and sultry weather and a dead calm. Crew employed in chipping and painting knees in the hold. Murphy laid up, pumps strictly attended to. Cunningham watchman.

140 Saturday, 4th Nov., 93.

Showery and squally all day. Crew employed in painting and chipping iron-work about deck. Pumps carefully attended to. Murphy laid up. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 5th Nov., '93.

Light airs and hot and sultry weather throughout the day. Pumps strictly attended to. Cunningham watchman. Murphy laid up.

Monday, 6th Nov., '93.

Fresh breeze and fine weather, discharged 538 deals, pumps strictly attended to. Murphy A. B. to hospital today. Cunningham watchman.

Tues., 7th Nov., '93.

Light breeze and fine weather. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Wed., 8th Nov., '93.

Light breeze and fine weather. Crew employed in painting iron knees in hold and passing water from shore. Pumps strictly attended to. Cunningham watchman.

Thur., 9th Nov., '93.

Mod. breeze and showery weather. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Frid., 10th Nov., '93.

Light breeze and fine weather throughout the day. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

141 Sat., 11th Nov., '93.

Light breeze and fine weather. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sun., 12th Nov., '93.

Mod. breeze and clear weather, pumps strictly attended to. Cunningham watchman.

Mon., 13th Nov., '93.

Light air and hot sultry weather. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Tues., 14th Nov., '93.

Mod. breeze and showery throughout the day. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Wed., 15th Nov., '93.

Fresh breeze and showery throughout the day. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Thur., 16th Nov., '93.

Light airs and sultry weather, discharged 296 deals, pumps strictly attended to. Cunningham watchman.

Frid., 17th Nov., '93.

Mod. breeze and fine and clear weather throughout the day. Discharged 621 deals, pumps strictly attended to. Cunningham watchman.

142 Sat., 18th Nov., '93.

Light breeze and showery throughout the day. Crew employed chipping iron about the main deck and beating rust of top sail sheets. Pumps strictly attended to. Cunningham watchman. Murphy A. B. came back from hospital today.

J. PAGE, *Mate.*

Sunday, 19th Nov., '93.

Light airs and sultry weather, pumps strictly attended to. Cunningham watchman.

Monday, 20th Nov., '93.

Light breeze and fine and clear weather, discharged 451 deals today. Pumps strictly attended to. Cunningham watchman.

Tues., 21st Nov.

Light breeze and cloudy weather. Crew employed in reeving aft running gear and clearing up hold for ballast, &c.. pumps strictly attended to. 4.50 p. m. One boat with 35 tons ballast, discharged part. Cunningham watchman.

Wed., 22nd Nov., '93.

Mod. breeze and warm weather, finished discharging ballast lighter at noon, pumps strictly attended to. Hands after discharging lighter variously employed. Cunningham watchman.

Thur., 23d Nov., '93.

Mod. breeze and cloudy weather. Crew variously employed painting the brown on ship's side. Caulking ports, &c. Pumps carefully attended to. Cunningham watchman.

143 Fri., 24th Nov., '93.

Light breeze and showery throughout the day. Crew variously employed, discharged 337 deals, pumps carefully attended to. Cunningham watchman.

J. PAGE, *Mate.*

Saturday, 25th Nov., '93.

Mod. breeze and fine weather, discharged on lighter of 25 tons ballast. Crew variously employed. Pumps carefully attended to. Cunningham watchman.

Sunday, 26th Nov., '93.

Light breeze and fine and clear weather, pumps strictly attended to. Cunningham watchman.

Mon., 27th Nov., '93.

Mod. breeze and fine and clear weather. Crew variously employed, pumps strictly attended to. Cunningham master.

Tues., 28th Nov., '93.

Light breeze and cloudy weather, discharged 435 deals which finishes cargo. Pumps carefully attended to. Cunningham watchman.

144 LIBELLANTS' EXHIBIT 2. Feb. 1, '97.

(Copy.)

Know all men by these presents that on this twelfth day of December 1893 before me W. G. Abbott Esq're H. B. M. consul general for this city and State of Rio de Janeiro personally came and appeared Thomas Wilson master of the British barque "Kate Burrill" of Yarmouth N. S. official No. 61817 who solemnly declared and stated as follows viz

That his vessel the "Kate Burrill" arrived in Rio de Janeiro from Pensacola on the 30th of August 1893 with a cargo of lumber consigned to the Companhia Industrial do Brazil that due written notice was handed to said consignees on the 4th of September 1893 that said vessel was ready to commence her discharge and that her lay days would commence on that day leaving 27 days for discharging which expired on the 6th of October.

That owing to the detention of the consignees the cargo was not all discharged until the 28th of November, 1893, thus delaying the vessel 53 fifty-three days beyond the lay days and for which demurrage is claimed to the amount of $3,158.38 as per charter-party which the consignees refuse to pay therefore the appearers has noted this protest which he has signed at the place and dated aforesaid.

THOS. WILSON, *Master.*

(Signed) W. G. ABBOTT,
H. B. M. Consul General.

In testimonium veritatis, British consulate. Rio de Janeiro, December 12, 1893.

JAMES PARK,
Acting Vice-Consul.

(Stamps.)

145 LIBELLANTS' EXHIBIT 3. Feb. 1, '97.

Companhia Uniao Mercantil, successora de Monteiro, Hime & C., Miranda, Guimaraes & C., Marinho, Reis & C., 32 Rua Theophilo Ottoni 32 Rio de Janeiro Caixa N. 593.

RIO DE JANEIRO, *November*, 1893.

The B. B. "Kate Burrill," 691 tons, Captain Wilson, in account with the Comp^a Industrial do Brazil, consignee.

To entry at custom-house & captain of the port.....	R. 40$000
" conferring manifest & list of stores...	40 000
" translation of manifest & copy.....	22 500
" stamps.....	50 000
" lighterage ac.....	4,081 400
" towage ac.....	112 500
" cash to captain.....	
" commission on inward freight, 2½ % on £1,390.6.5 = £34.15.2 at 10⅜...	804 050
" commission on outward freight.....	
" ship chandler's ac.....	
" outward charges.....	
" clearance at custom-house & captain of the port..	
" stevedore's ac.....	
" ballast ac.....	
	R. 5,150$450

CR.

By amount of freight as per charter-party 466,862 ft. at 13.50 & 47,394 ft. at 13.50 minus ⅛ = $6,729.17 at 4.84 = £1,390 6.5.....	
Less received £875.0.0 £515.6.5 at 10⅜.....	R. 11,920$680
Balance due vessel.....	Rs. 6,770$230

PELA COMPANHIA INDUSTRIAL
DO BRAZIL, *Thesoureiso.*

E. & O. E.

EDWIN E. HIME.

DR. Messrs. Wm. Burrill & Co'y in account with Phipps Bros. & Co'y. CR.

1893.					
Oct'b'r 9	To telegrams to Yarmouth.....	21,120	Nov'b'r 10	By cash received from Cia Industrial do Brazil ac. freight per "Kate Burrill" £875 0 0 at 10½d.....	20,000,000
Nov'b'r 16	To our remittance £875 0 0 at 10½d.....	20,000,000			
Dec'b'r 13	To disbursement of "Kate Burrill" as per list.....	7,137,520	Dec'b'r 7	By cash received from Cia Industrial do Brazil, balance of freight as per their statement.....	6,770,230
" "	To commission collecting freight R. 26,770-$230 at 1%.....	267,700			673,710
" 18	To telegram to Yarmouth.....	17,600	" 18	By balance.....	
		R. 27,443,940			R. 27,443,940
Dec'b'r 18	To balance £29 2 6 at 10¾d.....	673,710			

E. & O. E.
Rio de Janeiro, 18th December, 1893.

PHIPPS BROTHERS & CO.

398

147 (Copy.)

11TH OCT., 1893.

Messrs. Phipps Bros. & Co., merchant-, Rio Janeiro.

GENTLEMEN: We cabled you on 4th inst. "Kate Barbadoes Violate" on 9th inst. rec'd your reply "probably thirty days." On receipt this if you have not done so previously please cable date she sailed for Barbadoes. We also rec'd your letters of 5th Aug. and 2nd Sept. We presume the delay and extra cost of provisions and labor &c. will be a very serious additional expense for which the government of Brazil should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C. party that there is no exception clause covering these occurrences and it's just possible the consignees' cargo are liable.

Yours truly, WM. BURRILL & CO.

Per "Lassell" S. S.

PHIPPS BROTHERS & Co.,
RIO DE JANEIRO, 17*th November*, 1893.

Messrs. Wm. Burrill & Co., Yarmouth, Nova Scotia.

GENTLEMEN: Since writing on 16th ulto. we are in receipt of your favor of 11th *idem*.

There is absolutely no claim against the government that could be made good for loss occasioned by delays &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

148 We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is we understand most difficult to get labour and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times but have told him that he should look to his consignees to make the claim on the owners of the cargo. It is not at all unlikely that there will be still further delay in ballasting the vessel, as the revolutionary operations on the bay prevent ships from using the usual ballasting grounds.

We have received from the consignees a payment on account of freight which we are remitting in a draft enclosed at 120d. date for £875–0–0 on the London & River Plate Bank Ltd.; the 2nd and 3rd will follow in due course.

We will advise you by cable when the "Kate Burrill" sails.

We remain, gentlemen, very faithfully,

PHIPPS BROTHERS & CO.

(Endorsed:) William Burrill *et al. vs.* George W. Crossman *et al.* February 1, 1897. Depositions for libellants. Service of copy admitted Feb'y 19, 1897. Wheeler & Cortis, proc's for resp't-.

149 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Submitted November 9, 1898; decided December 7, 1898.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
GEORGE W. CROSSMAN and HERMAN SIELCKEN, Claimants, Appellees. } No. 1.

Appeal from the district court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

WALLACE, *Circuit Judge:*

Most of the questions arising upon this appeal have been disposed of by this court upon a former occasion, and it remains to be considered whether the defenses of payment and accord and satisfaction are sustained by the proofs. In considering these defenses we shall treat the case as though Phipps Bros. & Co., the agents of the appellants at Rio Janeiro, had authority coextensive with that of the appellants themselves to make any settlement or compromise with the consignees of the cargo in respect of freight and demurrage which might seem desirable; and as though the consignees, as agents for the appellees, had complete authority in their behalf to settle with Phipps Bros. & Co. for all items arising under the charter, including demurrage as well as freight. The appellees were liable to the appellants for a balance of freight due under the charter, and, as we have previously held, were also liable for demurrage for the detention of the vessel at Rio Janeiro. After the cargo had been discharged, the consignees rendered to Phipps Bros. & Co. an
150 account with the vessel, crediting her with the amount of "freight as per charter," and charging her with advances, payments, etc., and stating a balance due from them. That balance was paid, and Phipps Bros. & Co. receipted in full. The latter had made no claim against the consignees for the demurrage, although they had been instructed so to do by the appellants. They seem to have been under the impression that because the detention of the vessel had not been caused by the consignees, but by the acts of the revolutionists, the Brazilian government alone was responsible. The master of the vessel had told the consignees that they would have to pay demurrage, and they insisted that there was no liability. The master, however, had no authority to collect demurrage, and the consignees had been instructed not to settle the accounts with the master but to settle them with Phipps Bros. & Co.

Part payment of an unliquidated demand is not a discharge of the whole, unless accepted upon an agreement or understanding to that effect. The giving of a receipt in full, while evidence of such an agreement, is not conclusive. See Grinnell *vs.* Spink (128 Mass., 25). In the present case the receipt only purported to be in full of

the freight, and "cannot by any ingenuity be made to reach other claims." Harden *vs.* Gordon (2 Mass., 562).

An agreement to accept part of an unliquidated and disputed demand in full satisfaction of the whole demand, executed by the payment of a sum agreed upon, is of course a good accord and satisfaction. In this case there was no such agreement; nor was any disputed demand the subject of negotiation between the agents of the respective parties. Although the appellants had instructed Phipps Bros. & Co. to make a claim for demurrage, the latter, acting upon a misapprehension of the validity of the claim, did not do so; and the case stands as though the appellants had contemplated urging but had never urged it. Neither Phipps Bros. & Co., nor the consignees, supposed that a claim for demurrage was included in the demand which was adjusted. It is insisted for the ap-
151 pellees that the rendition and payment of the account by the consignees and the acceptance of the amount by the appellants has the effect of a stated and settled account between parties. The consignees doubtless supposed when they rendered their account with the vessel, and paid it, that they were paying all demands arising under the charter; and so did Phipps Bros. & Co. Nevertheless, it was the right of the latter, upon the discovery that they had a further valid demand against the consignees, within a reasonable time to insist upon opening the account. An account stated is a mere admission that the account is correct. If the party to whom it is rendered omits to communicate objections to the party rendering it within a reasonable time an inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account thus rendered. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never precluded from giving evidence that the account did not include all the demands between them unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties; as for instance where mutual compromises are made. Lockwood *vs.* Thorn (18 N. Y., 285); Stenton *vs.* Jerome (54 N. Y., 484). A stated and settled account is only *prima facie* evidence of its correctness. "It may be impeached by proof of unfairness, or mistake in law or in fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it." Parkins *vs.* Hart (11 Wheat., 237).

As a matter of fact the consignees were not agents for the appellees; they were the purchasers of the cargo. The appellees had chartered the vessel for the voyage from the appellants, and by the terms of the charter-party the master was to sign "bills of lading as presented," and the vessel was to have a lien upon the cargo for the freight. By the terms of the bill of lading presented by the
152 appellees, signed by the master and transferred to the consignees, the cargo was to be delivered to the latter upon the payment of the "freight as per charter-party;" and the consignees were entitled to the cargo upon such payment without liability for

demurrage save such as might be occasioned by their own neglect. The detention at Rio Janeiro for which the demurrage became due under the terms of the charter was not occasioned by the consignees, but by *vis major;* and the consignees were not, but the appellees by the terms of the charter were, liable for demurrage. In rendering the account and paying the freight the consignees were simply rendering and paying their own account, and the appellees can take nothing by their act save as it effected, what it purported, a payment of the freight.

The question whether there was a valid claim against the appellees for demurrage, was under the peculiar facts of the case a doubtful one. They were not personally at fault, but by the strict terms of the contract became liable for a contingency which was outside the contemplation of either party when the contract was made. Under the circumstances justice will be satisfied by decreeing the payment of the principal without interest. The proofs show a detention of the vessel contrary to the terms of the charter of fifty-three days, entitling the appellants to demurrage in the sum of $3,151.

The decree of the court below is reversed with instructions to decree accordingly with costs.

Lawrence Kneeland, for the appellants.

Everett P. Wheeler, for the appellees.

153 At a stated term of the United States circuit court of appeals for the second circuit held at the court-rooms, in the Federal building, in the borough of Manhattan, city of New York, on the 20th day of December, 1898.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

WILLIAM BURRILL ET AL., Libellants & Appellants,
vs.
GEORGE W. CROSSMAN ET AL., Respondents & Appellees.

This cause having come on to be heard on the appeal of the libellants from a final decree of the district court of the United States for the southern district of New York, entered January 16, 1895, and the pleadings having been amended and further testimony having been taken in this court on said appeal, and the cause having been argued and submitted and due deliberation having been had, now, on motion of Black & Kneeland, proctors for the libellants and appellants, it is—

Ordered, adjudged, and decreed that the said decree of said district court be, and the same is hereby, reversed with costs, and that a mandate issue from this court to said district court directing that it decree in favor of the libellants for the sum of thirty-one hundred and fifty-one dollars, with costs.

W. J. W.
E. H. L.

Endorsed: U. S. circuit court of appeals, second circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Order and notice.

Black & Kneeland, proctors for lib'l't-, 44 Pine St., New York city. Due service of a copy of the within order and notice is hereby admitted. Dated Dec. 12, 1898. Wheeler & Cortis, proctors for Crossman. United States circuit court of appeals, second circuit. Filed Dec. 20, 1898. William Parkin, clerk.

154 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages numbered from 1 to 153, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William Burrill *et al.*, libellants, appellants, against George W. Crossman *et al.*, respondents, appellees, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

WM. PARKIN, *Clerk.*

[Ten-cent internal-revenue stamp, canceled 1, 9, '99, W. P.]

155 U. S. Circuit Court of Appeals.

WILLIAM BURRILL ET AL.
against
WILLIAM H. CROSSMAN ET AL.

It is stipulated and agreed that the certified copy of the transcript of record on file in the Supreme Court, at Washington, be taken as a return to the writ of certiorari.

New York, January 25, 1899.

WHEELER & CORTIS,
Proctors for Wm. Crossman et al.
BLACK & KNEELAND,
Proctors for William Burrill et al.

A true copy.

WM. PARKIN, *Clerk.*

156 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant- said stipulation is certified as a return to this writ.

Dated New York, January 25th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 1, 26, '99. W. P.]

157 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson, and John R. Blauvelt, owners of the bark "Kate Burrill," are appellants and George W. Crossman and Herman Sielcken are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
158 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and pro-

ceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

159 [Endorsed:] No. 17,260. Supreme Court of the United States. No. 187, October term, 1899. George W. Crossman & Herman Sielcken *vs.* William Burrill *et al.* Writ of certiorari & return. Filed Feb'y 1, 1899.